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THE WHITE HOUSE

WASHINGTON

April 22, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Forum for a Presidential Speech on his Judicial Philosophy and Selection of Judges

Pat Buchanan has suggested to you and Attorney General Meese that consideration be given to having the President deliver a major address on his judicial philosophy and the criteria he uses in selecting judges. Buchanan indicated the address could also contain the President's thoughts on recent Supreme Court decisions. He attached to his memorandum a copy of Bruce Fein's 1982 address before the Federal Legal Council on "Executive Branch Criticism of Judicial Decisions: Vindicating the Constitution's Separation of Powers."

I have no objection to an address by the President explaining his belief in judicial self-restraint and discussing the appropriate role of the three branches under the constitutional doctrine of separation of powers. Attorney General Smith wrote and spoke extensively on those subjects (see attachments). I would avoid criticism of specific Supreme Court decisions, however, not only because such criticism is rarely productive but also because it would inevitably overshadow the more important articulation of the President's view on the proper role of the Federal judiciary. Under no circumstances should the President's address proceed along the lines of Fein's unalloyed jurisprudential iconoclasm. In short, Buchanan's suggestion is a good one if we can control the development of the speech. If not, it could be a disaster.

The attached response sketches the appropriate approach to take in such a Presidential address, volunteers the services of our office in preparing a first draft (the best way to control the development of the speech), and suggests the upcoming ABA convention as a possible forum.

Attachment

THE WHITE HOUSE

WASHINGTON

April 22, 1985

MEMORANDUM FOR PATRICK BUCHANAN
ASSISTANT TO THE PRESIDENT
FOR COMMUNICATIONS

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Suggested Presidential Address on Judicial Philosophy

I agree with your suggestion that consideration be given to having the President deliver a major address articulating his judicial philosophy and the criteria he employs in selecting nominees for the Federal bench. Such an address could be expanded to include the President's views on the proper role of the three branches under the constitutional system of separated powers. Attorney General Smith made a major effort to address these themes, as evidenced by the attached, but his message did not reach much beyond the legal community.

As I see it, the key points for the President to make are that the Constitution prescribes a limited role for the Federal judiciary, one that does not infringe on the policy-making prerogatives of the popularly elected and politically accountable branches, and that he will appoint judges who recognize this limited role and will exercise judicial self-restraint. This is hardly to politicize the judiciary, but rather to keep it free from partisan politics by leaving politics to the political branches. Nor is such a view in any sense an attack on the judiciary; quite the contrary. As Robert Jackson put it:

> It is precisely because I value the role the court performs in the peaceful ordering of our society that I deprecate the ill-stared adventures of the judiciary that have recurringly jeopardized its essential usefulness.... By impairing its own prestige through risking it in the field of policy, it may impair its ability to defend our liberties.

I do not think it would be wise for the President to criticize specific Supreme Court decisions. Such criticism would alienate certain sitting Justices, and, more importantly,

would doubtless overshadow the articulation of a considered view of the role of the judiciary in the constitutional scheme.

This office would be happy to prepare a first draft of any such address by the President, and work closely with the speechwriting apparatus in developing the speech. For the appropriate forum, the President could appear before the ABA convention later this summer.

FFF:JGR:aea 4/22/85
cc: FFFielding
JGRoberts
Subj
Chron

Urging Judicial Restraint

By William French Smith

ON September 27, 1787, the nation's first president, in one of his earliest official acts, offered the position of attorney general to Edmund Randolph. In his letter, George Washington wrote: "Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its political system."

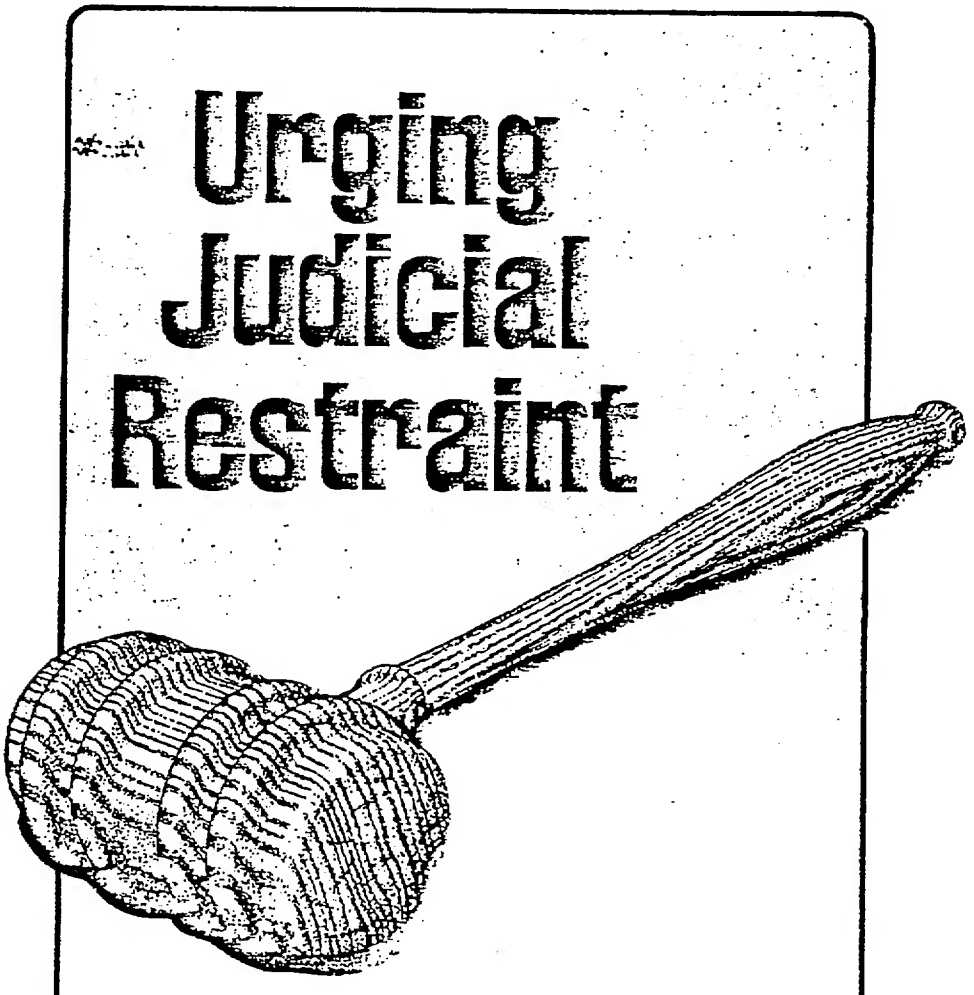
Attorneys general of the United States since the first have shown a similar concern for the role and functioning of the federal courts. With that in mind, the time has come to recognize that, in many instances, the courts have been drawn by litigants before them into areas properly and constitutionally belonging to the other branches or to the states. Those intrusions have not fostered, in Washington's words, "the happiness of our country" or "the stability of its political system."

This program is not an attack on the courts

In the spirit of Washington's admonition to the first attorney general, the Department of Justice is undertaking a conscious effort to encourage judicial restraint. We have supported and will continue to support the selection and appointment of federal judges who recognize the limits of judicial power and the virtues of judicial restraint. We will review our litigation efforts across the board and bring our concern about judicial restraint to bear in deciding what cases to bring and what appeals to prosecute. The arguments lawyers from the Department of Justice make in court — whether as plaintiff, defendant, or *amicus curiae* — will consistently reflect an awareness of the vital importance of judicial restraint in our democratic system and an effort to secure its implementation.

At the outset I want to make clear that the announcement and implementation of this program should not be viewed as any sort of "attack" on the courts. As Chief Justice Taft recognized long ago: "Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism. . . . In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep judges alive to the reasonable demands of those they serve." Taft, "Criticisms of the Federal Judiciary," 29 *American Law Review* 642–643 (1895), quoted in Mason, *William Howard Taft: Chief Justice* 92 (1965).

Chief Justice Stone reiterated these themes: "I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the



The Justice Department is undertaking a conscious effort to aid the courts exercise self-restraint.

ically denied them by the Framers of the Constitution. As Justice Powell has admonished, "we should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (concurring opinion). Strict adherence to standing requirements and the other aspects of justiciability guards against these contradictions.

A second means by which courts arrogate to themselves functions reserved to the legislative branch or the states is through "fundamental rights" and "suspect class" analyses, both of which invite broad judicial scrutiny of the essentially legislative task of classification. Federal courts must, of course, determine the constitutionality of enactments when the issue is properly presented in litigation. In discharging that responsibility, however, courts also must, in the words of Justice Frankfurter, have "due regard to the fact that [they are] not exercising a primary judgment but [are] sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 164 (1951) (concurring opinion). Courts cannot, under the guise of constitutional review, restrike balances struck by the legislature or substitute their own policy choices for those of elected officials.

Two devices which invite courts to do just that are "fundamental rights" and "suspect class" review. It is, of course, difficult to criticize "fundamental rights" in the abstract. All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution, arbitrarily elevate it over other constitutional rights and powers by attaching the label "fundamental," and then resort to it as, in the words of one of Justice Black's dissents, "a loose, flexible, uncontrolled standard for holding laws unconstitutional." *Griswold* v. *Connecticut*, 381 U.S. 479, 521 (1965). The broad range of rights now alleged to be "fundamental" by litigants, with only the most tenuous connection to the Constitution, bears ample witness to the dangers of this doctrine.

Analysis based on "suspect classes" presents many of the same problems. Classifications based on race are suspect and do merit careful scrutiny, in light of the historic purpose of the 14th Amendment. Extension of heightened scrutiny to other "insular and discrete" groups, however, represents an unjustified intrusion into legislative affairs. As with fundamental rights, there is no discernible limit to the intrusion. As Justice Rehnquist has put it: "Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman* v. *Dougall*, 413 U.S. 634, 657 (1973) (dissenting opinion). Both "fundamental rights" and "suspect classes" stand as invitations for a degree of judicial intrusion not invited by the Constitution, a means through which courts impose values that do not have their source in that document.

Use of extraordinary equitable decrees is a key area

Another key area in which we will focus our efforts is the use of extraordinary equitable decrees. This is the all-too-familiar problem of judges taking over the running of state institutions, most notably prisons and schools. When confronting constitutional problems in the context of the administration of state institutions, courts must be particularly cognizant of their lack of expertise, and the fact that the *ad hoc* approach inevitable in litigation is often ill-suited to solving the complex and intractable problems of institutional reform. The Supreme Court has adverted to these concerns on many occasions. In *Milliken* v. *Bradley*, 418 U.S. 717, 744–745 (1974), Chief Justice Burger, writing for the Court, expressed concern over the scope of a remedial decree because it would make the court a de facto legislative authority and school superintendent. "This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." Just last term the Supreme Court criticized a lower court for relying on factors that "properly are weighed by the legislature and prison administration rather than a court." *Rhodes* v. *Chapman*, 101 S.Ct. 2392, 2400 (1981). Our efforts in this area, both as defendant and as plaintiff or *amicus curiae*, will be to ensure that the lower courts heed these wise admonitions.

The exercise of sound judicial restraint is, of course, ultimately the responsibility of the judges themselves, but it is incumbent on the other branches of government to aid in the endeavor. We in the executive branch will be doing our part through our program of litigation. We shall not only urge judicial restraint when we are defending the federal government, but we also shall exercise self-restraint. We shall not advance arguments that promote judicial activism even when those arguments might help us in a particular case. The end of success in any specific case does not justify the means of encouraging judicial activism.

Congress also has a role to play. Too often Congress invites judicial activism by open-ended statutory provisions and by leaving important questions unresolved in statutory enactments. Congress must face up to its responsibilities and not leave significant policy decisions to be resolved in litigation. As John Locke wrote, the power of the legislative branch is "to make laws, and not to make legislators." Congress also should carefully consider the constitutionality of its enactments, for, as the Court noted last term in *Rostker* v. *Goldberg*, 101 S.Ct. 2646 (1981), careful consideration by Congress encourages heightened deference from the courts.

In focusing on particular results, we must always remain conscious of the limitations implicit within a system of ordered liberty. The Constitution did not grant courts the power to reach results merely because they deem them desirable. It granted that role to legislative action, and it confined even that legislative power within constitutional bounds.

Edwin Corwin tells the story of a young man who called on Justice Holmes after his retirement from the Court. The young man wanted to know what irreducible principle guided the great jurist in deciding constitutional cases. "Young man," said Holmes, "I discovered about 75 years ago that I wasn't God Almighty." It is time that we all realized that the Constitution envisions judges who interpret the law, not robed prophets who fashion it.

Journal

(William French Smith is attorney general of the United States. Prior to his appointment by President Reagan, he practiced law in Los Angeles.)

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Journal

(William French Smith is attorney general of the United States. Prior to his appointment by President Reagan, he practiced law in Los Angeles.)

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Subject: Issues for a Presidential Speech on his Judicial philosophy and selection of judges

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CW Holland	ORIGINATOR DD	85/04/18			1 1
	Referral Note:				
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
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B - Non-Special Referral
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THE WHITE HOUSE

WASHINGTON

April 15, 1985

MEMORANDUM FOR THE ATTORNEY GENERAL
FRED F. FIELDING

Given the media attention, and controversy, surrounding the judicial selections of the President, this idea from Bruce Fein, it seems to me, is worth reflection.

Why not select quietly some forum in the future -- after the Budget and Contra battles -- where the President can deliver a polished, scholarly, address on his judicial philosophy, the criteria he uses in selecting judges and will use in selecting Justices, containing also the President's thoughts of some recent historic and controversial Supreme Court decision. Every great President, virtually, has been at one time or another at odds with the Supreme Court. There is no prohibition against a President enunciating the views of the Executive; the President's judicial philosophy is a clear winner with the American people, the debate could be decorous as well as historic. We might do it in anticipation of the 200th anniversary of the Constitution. It would go some distance toward making the President the linear successor to the Founding Fathers in terms of philosophy, and by extension, the GOP the Party of the Constitution.

Pat Buchanan

Patrick J. Buchanan
Assistant to the President

Attachment

Department of Justice

EXECUTIVE BRANCH CRITICISM OF JUDICIAL DECISIONS: VINDICATING THE CONSTITUTION'S SEPARATION OF POWERS

ADDRESS BY:

BRUCE E. FEIN
ASSOCIATE DEPUTY ATTORNEY GENERAL

FEDERAL LEGAL COUNCIL

BOAR'S HEAD INN
CHARLOTTESVILLE, VIRGINIA

NOVEMBER 4, 1982

Executive Branch Criticism of Judicial Decisions: Vindicating the Constitution's Separation of Powers

Criticisms of some decisions of the Supreme Court voiced by the Reagan Administration have elicited a reverential defense of the Court by academicians, journalists, and Congressmen. These defenders typically suggest or assert that judicial independence safeguarded by the Constitution is endangered when the Executive Branch questions the correctness of Court rulings. This contention is false.

Part I demonstrates that it is both historically commonplace and constitutionally imperative for the Executive Branch to challenge Supreme Court decisions that are unfaithful to the Constitution and that might plausibly be reversed in future cases.

Part II argues that several prevailing judicial doctrines are particularly vulnerable to Executive Branch criticism in this regard. Finally, those who excoriate this hortatory participation of the Executive Branch in the evolution of constitutional law frequently invoke canons of judicial infallibility and moral superiority to justify shielding the Supreme Court from external scrutiny; Part III argues, however, that history discredits these canons and that, moreover, they are utterly irreconcilable with a democratic government of law.

I.

As members of the Executive Branch, as lawyers, and as advocates before federal courts, we all are dutybound to promote constitutional doctrines faithful to the intent of the Founding Fathers. The discharge of that duty is a central component of the Constitution's separation of powers and its checks and balances among the three branches of the federal government. Although the Executive Branch is bound by the terms of a particular court decree, our constitutional architects recognized that this obligation is consistent with Executive Branch criticism of misinterpretations of the Constitution by the Supreme Court or subordinate tribunals prompted by a need to restrain judicial excesses.

Historically, the Executive Branch has frequently been at loggerheads with the Judicial Branch. Thomas Jefferson, James Madison, Andrew Jackson, and Abraham Lincoln, giants of the American Presidency, asserted a right of independent Executive Branch interpretation of the Constitution in the discharge of Executive Branch functions. Although the Reagan Administration does not fully subscribe to the scope of Executive independence expounded by these eminent statesmen, to assemble their thoughts and actions regarding this issue helps to provide a rich understanding of its complexities. This historical recounting also demonstrates that the circumscribed advocacy role in constitutional interpretation asserted by the incumbent Administration is neither historically unprecedented nor constitutionally unsound.

Thomas Jefferson observed that "[e]ach of the three departments [of the federal government] has equally the right to

decide for itself what is its duty under the Constitution, without any regard to what others may have decided for themselves under a similar question."[1] Thus, President Jefferson instructed United States Attorneys to desist from enforcing the Sedition Act because he believed it affronted the First Amendment, despite several court rulings upholding the constitutionality of the Act.[2] Furthermore, Jefferson pardoned persons convicted under the Act during the prior Administration, explaining his actions as follows:

> The judges, believing the [Sedition Act] constitutional, had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but the legislature and executive also in their spheres, would make the judiciary a despotic branch.[3]

James Madison similarly maintained that as the three branches of government are coordinate and equally bound to support the Constitution:

> "[E]ach must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it; and that consequently in the event of irreconcilable interpretation, the prevalence of one or the other department must depend on the nature of the case, as receiving its final decision from one or the other, and passing from that decision into effect, without involving the functions of any other.[4]

In accord with the views of Jefferson and Madison, President Jackson disputed the Supreme Court's opinion in McCulloch v. Maryland[5] holding that the Bank of the United States was constitutional, and vetoed a bill that would have rechartered the Bank. In a veto message authored by Roger B. Taney, later Chief Justice of the Supreme Court, Jackson insisted that the rechartering would be unconstitutional despite McCulloch, and elaborated on Executive Branch authority to act contrary to judicial opinion:

> The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have

only such influence as the force of their reasoning may deserve.[6]

Abraham Lincoln voiced analogous sentiments regarding the infamous Dred Scott decision, which held that blacks were barred from United States citizenship and that Congress lacked authority to proscribe slavery in United States territories.[7] In the Lincoln-Douglas debates, Lincoln declared that although he would not defy the particular decree in Dred Scott, he would not obey it as a political rule: "If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new Territory, in spite of the Dred Scott decision, I would vote that it should."[8] And Lincoln inveighed against the idea that Dred Scott bound members of Congress or the President to act consistently with the principles of the decision, and stated an intent to seek a reversal of the Dred Scott precedent.[9]

During his Presidency, Lincoln acted in accord with these views. He signed a bill in 1862 prohibiting slavery in United States territories[10], and issued the Emancipation Proclamation in seeming defiance of the constitutional doctrines expounded in Dred Scott.[11] Moreover, Lincoln ignored the circuit court decree of Chief Justice Taney in Ex parte Merryman[12], which held that the President lacked authority to suspend the writ of habeas corpus without the consent of Congress, because Lincoln held a contrary constitutional view.[13]

The Administration has not embraced the constitutional theories propounded by Jefferson, Madison, Jackson, and Lincoln. It has recognized, however, that judicious questioning by the Executive of ill-conceived judicial decisions may be necessary to

restrain unelected federal judges from exercising policymaking powers assigned by the Constitution to the elected branches of government, to the States, and to the people. The checks and balances in the Constitution were engineered with the understanding that human nature would predispose each branch of government to expand its authority[14], the federal judiciary included. As Attorney General Ceasar Rodney observed 175 years ago, "The judicial power, if permitted, will swallow all the rest. [It] will become omnipotent."[15] And a desire for fame and remembrance by some contemporary judges may incline them toward bold and innovative constitutional interpretations that may frustrate the popular will.[16]

The duty of the Executive is to check with informed and pointed remonstrance judicial propensities to encroach upon the powers of the popular branches of government. As Attorney General Robert A. Jackson noted, his duty was not to venerate the Supreme Court or its Justices, but to point out what seemed to him to be the Court's mistakes or shortcomings.[17] Judicial excursions into policymaking must be counteracted by the elected branches in order to protect the Nation's democracy.[18] As President Franklin Roosevelt explained:

> The essential democracy of our Nation and the safety of our people depend...upon lodging [power] with those whom the people can change or continue at stated intervals through an honest and free system of election.[19]

Judicial observations and the checkered course of various constitutional doctrines suggests further that informed

Executive Branch criticism of court rulings is productive, and not simply an empty exercise. Eminent Justices of the Supreme Court have testified to the salutary effect of thoughtful commentary on the Court's decisions and doctrines. Chief Justice William Howard Taft asserted:

> Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism. . . . In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.[20]

Justice David J. Brewer echoed these sentiments in observing that:

> It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the object of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or

> body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all.[21]

And Chief Justice Stone reproved unthinking reverence of judicial decisions, declaring:

> I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.[22]

Justice Felix Frankfurter urged a sustained and informed public critique of court decisions[23], and suggested the influence of trenchant criticism in a letter to his former law clerk Alexander Bickel:

> I can assure you that explicit analysis and criticism of the way the Court is doing its business really gets under their skin, just as the praise of their constituencies, the so-called liberal journals and well-known liberal approvers, only fortifies them in their present result-oriented jurisprudence.[24]

The accuracy of Frankfurter's suggestion is confirmed by the successes of Presidents Jefferson and Franklin Roosevelt in midwifing periods of judicial restraint by declaiming and acting against judicial misconstructions of the Constitution.

Confronted with a hostile federal judiciary monopolized by adherents to the Federalist Party[25], Jefferson obtained statutory abolition of sixteen circuit judgeships[26], the restoration of arduous and hazardous circuit riding duties on Supreme Court Justices[27], the suspension of one term of the Supreme Court after a show cause order in Marbury v. Madison had been issued[28], and the impeachment of Associate Justice Samuel Chase[29], a fervent supporter of Sedition Act prosecutions against supporters of the Republican Party.[30] Jefferson and his Attorney General further complained of judicial excesses and the veneration accorded court rulings, and agreed that:

> The judiciary have been so much elevated above every other department of the Government, by the fashion and I may add the folly of the times, that it seems dangerous to question their omnipotence. But the period has arrived when this colossal power, which bestrides the legislative and executive authorities, should be reduced to its proper limits.[31]

Indicative of Jefferson's success in achieving judicial restraint are the facts that Chief Justice John Marshall advocated appellate review by Congress of Supreme Court decisions in the aftermath of the Chase impeachment[32], that the Supreme Court upheld the constitutionality of abolishing federal judgeships[33] and renounced any federal common law authority to impose criminal sanctions[34], and that over fifty years elapsed after the decision in Marbury v. Madison before the Supreme Court

declared another act of Congress unconstitutional.[35] During that period, only a handful of state or local laws were overturned.[36] A scholar of the Marshall Court has asserted that the threats of impeachment and Congressional curtailment or elimination of federal court jurisdiction strongly influenced a judicial turn towards moderation after 1801.[37]

President Franklin Roosevelt succeeded in attaining over a decade of judicial restraint by criticizing the Supreme Court for decisions that scuttled several New Deal programs on constitutional grounds[38], and by proposing a "Court Packing" bill that would have enlarged the Court's membership.[39] In a 1937 broadcast address, Roosevelt decried judicial doctrines that made the Supreme Court the ultimate overseer of public policy, and that enabled the Court to amend the Constitution by fiat. Roosevelt's pointed assault on decisions that made the elected branches of government subservient to the Judicial Branch employed language and logic that is timeless:

> In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policymaking body.
>
> When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of

the Court has been assuming the power to pass on the wisdom of these Acts of the Congress--and to approve or disapprove the public policy written into these laws.

That is not only my accusation. It is the accusation of most distinguished Justices of the present Supreme Court. I have not the time to quote to you all the language used by dissenting Justices in many of these cases. But in the case holding the Railroad Retirement Act unconstitutional, for instance, Chief Justice Hughes said in a dissenting opinion that the majority opinion was "a departure from sound principles," and placed "an unwarranted limitation upon the commerce clause." And three other Justices agreed with him.

In the case holding the A.A.A. unconstitutional, Justice Stone said of the majority opinion that it was a "tortured construction of the Constitution." And two other Justices agreed with him.

In the case holding the New York Minimum Wage Law unconstitutional, Justice Stone said that the majority were actually reading into the Constitution their own "personal economic predilections," and that if the legislative power is not left free to choose the methods

of solving the problems of poverty subsistence and health of large numbers in the community, then "government is to be rendered impotent." And two other Justices agreed with him.

In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people.

In the face of such dissenting opinions, it is perfectly clear, that as Chief Justice Hughes has said: "We are under a Constitution but the Constitution is what the Judges say it is."

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress--a super-legislature, as one of the Justices has called it--reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court

> which will do justice under the Constitution--not over it. In our Courts we want a government of laws and not of men.
>
> I want--as all Americans want--an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written--that will refuse to amend the Constitution by the arbitrary exercise of judicial power--amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.[40]

It would appear that Roosevelt's criticisms were a productive contribution to the development of constitutional jurisprudence. Soon after their entrance into the public debate over the federal judiciary, the Supreme Court swiftly renounced any power to examine the wisdom of national or state public policies[41], or to stultify Congressional power under the Commerce Clause[42] or Spending Clause[43], and in the process overruled a multitude of cases based on contrary understandings.[44] During the decade following FDR's harsh criticism and the unfurling of his so-called "Court Packing Plan," the number of laws held unconstitutional by the Court declined dramatically.[45]

The Administration is emphatically opposed to the techniques of court packing[46], suspending terms of the Supreme Court [47], abolishing judgeships[48], and impeachment[49], championed by Roosevelt and Jefferson to check judicial excesses. The

Administration does believe, however, that after careful and solemn deliberation the Executive Branch may properly request the courts to reconsider doctrines or decisions that reflect an unwarranted nullification of popular will. It is noteworthy that the Emancipation Proclamation would never have been issued, and the Norris-LaGuardia Act[50] and the network of New Deal legislation[51] would never have been enacted if Congress and the President had been unwilling to challenge Supreme Court precedents.

Nonetheless, the charge should be anticipated that criticism of the judiciary betrays American traditions, judicial independence, and the Executive Branch duty to execute faithfully the laws. Indeed, a celebrated historian has accused the President and the Attorney General of an "insidious" "assault" on the Constitution because legal arguments have been advanced by the Administration that do not parrot judicial precedents.[52] The accusation is false.

Indeed, Executive Branch criticism of decisions of the Supreme Court and lower courts may be imperative to correct erroneous judicial doctrines and to safeguard the separation of powers. This principle is endangered by Executive or Congressional silence in the face of judicial usurpation of the functions assigned to elected officials by the Constitution.

II

Since 1950, judicial invalidation of statutes and assertions of policymaking authority have become commonplace.[53] During the decade of the 1970s, the Supreme Court held over 200 laws unconstitutional, a record high that exceeded the number of

unconstitutional rulings during the 1960s when the Court was captained by Chief Justice Earl Warren, and during the decade preceding Roosevelt's "Court Packing" proposal.[54]

During the 1970s, exercise of policymaking by the Supreme Court was manifest in decisions denouncing the death penalty[55] and procedures for its implementation[56]; the regulation of abortion[57], contraceptives,[58] and commercial speech[59]; government aid to nonpublic schools[60]; and restrictions on mandatory busing to achieve racial balance in the classroom.[61] Unauthorized assertions of judicial power also occurred in a multitude of cases fastening Procrustean procedural obligations on government to protect substantive statutory rights.[62] Burgeoning federal judicial power shows no sign of abatement. Illustrative is the fact that during the 1981-82 Term of the Supreme Court, an aggregate of twenty-three federal, state, and local laws were held unconstitutional.[63]

Several doctrines frequently trumpeted by contemporary federal courts to justify frustration of the popular will deserve censure by the Executive Branch. Foremost is the theory that the Constitution is a "living document" that tacitly endows the courts with authority to rectify modern ills of society that a judge prophecies is offensive to contemporary norms of decency or morality. The idea was recently expressed in this way: "Our Constitution is a living document and the Court often becomes aware of the necessity for reconsideration of its interpretation only because filed cases reveal the need for new and previously unanticipated applications of constitutional principles."[64]

This theory of judicial authority is without constitutional foundation. There is no evidence that the Founding Fathers intended to crown the Supreme Court with authority to alter interpretation of the Constitution in light of contemporary needs.[65] Article V of the Constitution provides the safeguard against antiquation by delineating processes for amendment by the elected representatives of the people.[66] To circumvent Article V and its dedication to self-government through ipse dixit by unelected judges who insist that social necessity has changed the meaning of the Constitution makes a mockery of the amendment process. The hazards of such loose constitutional construction were recognized by Thomas Jefferson:

> I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. . . . Let us go then perfecting it, by adding, by way of amendment to the Constitution, those powers which time & trial show are still wanting.[67]

The living document theory has fostered intellectual flabbiness in the Court's constitutional interpretations, which has, in turn, occasioned ill-conceived doctrines. The Supreme Court has, for example, discovered certain fundamental rights[68] superior to other constitutional rights, and has insisted that certain legislative or executive classifications are suspect[69] or

semi-suspect[70], and thus should be examined with hostility by the judiciary.

The Supreme Court has declared that voting[71], the abortion choice by the mother[72], interstate travel[73], possession of obscenity in the home[74], and decisions relating to childbearing[75] and marriage[76] are all crowned with the special status of "fundamental". The Court has further asserted that classifications made by states based on alienage,[77] and race are "suspect"[78], except when whites or citizens of Japanese ancestry are the target of discrimination.[79] By Supreme Court edict, semi-suspect status beclouds classifications based upon gender[80] or illegitimacy.[81]

Once a right is declared fundamental by the Court, then any burden placed by the government on its exercise is unconstitutional, unless the burden advances a compelling interest that cannot be achieved by other methods.[82] Similarly, a suspect classification passes constitutional muster only if clearly necessary to promote a compelling government interest.[83] If a classification is semi-suspect, it survives judicial review only if the classification serves an important government objective and is substantially related to the achievement of that objective.[84] Thus, the Court ordinarily holds unconstitutional burdens placed on fundamental rights,[85] or suspect[86] or semi-suspect classifications.[87]

The terms of the Constitution, however, do not suggest a hierarchy of constitutional rights or disfavored legislative classifications--except with regard to classifications concerning the franchise.[88] Nor do these theories of interpretation derive

support from the debates during the adoption of the Constitution or its amendments--except, of course, that the history of the Fourteenth Amendment suggests that racial classifications should undergo strict constitutional scrutiny.[89] But with these exceptions of race and voting, the doctrines of fundamental rights, and suspect or semi-suspect classifications are illegitimate assertions of federal judicial power.

The Supreme Court has defended its suspect classification doctrine as necessary to protect discrete and insular minorities from hostile or misguided legislative action insufficiently responsive to them.[90] The Founding Fathers, however, engineered a system of federalism,[91] legislative districting,[92] frequent elections and different electoral constituencies for Senators, Congressmen, and the President,[93] and alliances among varied interest groups to forestall injudicious legislation.[94] The federal judiciary was not envisioned as a special defender of particular minority interests beyond the terms of the Constitution. It was contemplated that laws reflecting majoritarian tyranny against a minority would be held unconstitutional,[95] but that laws expressing the legitimate desires of all or a portion of the electorate would pass constitutional scrutiny[96]--absent a violation of express constitutional edicts, many of which are animated by concerns other than majoritarian tyranny.[97]

Our constitutional form of government therefore presumes that a political minority unsuccessful in opposing legislative action must nevertheless accept the legislation as legitimate, whether or not the minority happens to be

disproportionately comprised of a particular political party, economic or social class, race, or other group. This precept, as Thomas Jefferson declared, is "the fundamental law of every society . . ."[98]

The fundamental rights and suspect or semi-suspect classification doctrines have thus been applied by the federal judiciary to deny the elected representatives of the people the opportunity to conciliate competing social interests in legislative compromises--a hallmark of healthy self-government. In 1941, Attorney General Robert Jackson illuminated the vice of such judicial hegemony:

> After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure such as the Missouri Compromise, the N.R.A., the A.A.A., a minimum-wage law, or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic

conciliation of our social and economic conflicts.[99]

Moreover, because the concepts of suspect or semi-suspect classifications and fundamental rights lack any basis in the Constitution's text, structure, or history, their cognate legal doctrines empower the federal courts to choose arbitrarily which laws are answerable to lethal constitutional scrutiny. The personal preferences of unelected federal judges rather than constitutional intent become decisive in constitutional interpretation. A paramount purpose of the Constitution--to install a government of laws in lieu of a government of men[100]--is thereby frustrated. A written Constitution, as Thomas Jefferson explained, should protect persons from the threat of capricious government action irrespective of the personal qualities of the incumbent officeholders.[101]

Unconstitutionality should not be confused with a divergence from a federal judge's personal concept of fairness or justice. As Justice Holmes explained to Learned Hand, his duty was not to invoke some personal standard of justice; his duty was to play the game according to the rules.[102] This accords with the view expressed during the Constitutional Convention by James Wilson, later Associate Justice of the Supreme Court, that a judge may believe that laws are unjust, unwise, and destructive, yet would not be justified in condemning them as unconstitutional.[103] As Justice Swayne admonished in Edwards v. Kearzey[104], "'Policy and humanity' are dangerous guides in the discussion of a legal proposition. He who follows them far is

apt to bring back the means of error and delusion." The Constitution emphatically tolerates a broad spectrum of government policies that a judge may believe misguided or unfair;[105] it is a charter of Popular Government, not a mere lawyers' document.[106] And if the Supreme Court acts unchained from the terms and intent of the Constitution, an example is set that may grow out of control.

The doctrines of procedural and substantive due process unfolded by the Supreme Court also deserve rebuke. In a multitude of cases[107], the Court has insisted that while legislatures may create statutory rights, the Constitution strictly limits any attempt concurrently to delineate the procedures that safeguard against their improper deprivation. A state that creates a property interest in government employment, for example, is constitutionally forbidden to authorize discharge without notice or hearing.[108] Likewise, a state that creates a property right in the opportunity to attend public schools may not suspend a student for misbehavior without a hearing, absent exigent circumstances.[109]

The Supreme Court has never satisfactorily explained why due process is disturbed by a government decision to create a property or liberty right without associated procedural protections liked by the judiciary. The Court unpredictably approves or disapproves of procedures depending on its concept of fairness.[110] Idiosyncratic notions of "fairness," however, are not inscribed in the text of the Constitution as a norm to guide scrutiny of legislative action. Furthermore, legislators might create a right only if they can curb its economic and social

costs by delimiting the procedural protections afforded that right. The unauthorized procedural due process doctrine of the Supreme Court thus forecloses types of legislative compromise necessary to the enactment of liberty or property rights.

The doctrine of substantive due process has reemerged in recent years after decades of dormancy since 1937.[111] The doctrine was initially employed to protect slaveholders[112] and to scuttle countless economic and other statutes that offended the Supreme Court's vision of unregulated markets for goods or services.[113] For at least a generation after 1937, the doctrine was accurately viewed as a constitutionally illegitimate judicial invention wielded to advance the policy preferences of the federal bench.[114]

Despite its ignominious past, substantive due process was then resurrected by the contemporary Supreme Court to fasten judicial conceptions of wise social policy on the Nation. Thus, zoning laws with a bounded concept of family have been nullified[115], and rights to treatment for the mentally ill[116] and access to contraceptives[117] have been created under the banner of substantive due process. Subordinate courts have promulgated additional substantive due process rights.[118]

These rights are not derived from the terms of the Constitution or the intent of its architects. Rather, federal judges justify their invention by invoking "praiseworthy traditions" or "fundamental values" of the Nation that excite their sympathies.[119] But how do judges divine such traditions or values? Their cloistered existence makes them unattractive candidates for accurately distilling national norms from the vast

diversity of views held in countless communities throughout the Nation. The actions of elected representatives are the best proxy of the Nation's fundamental values. The Court acts improperly if it rejects these values as ill-advised or unenlightened.

Supreme Court decisions that have rendered moribund the standing[120] and political question[121] doctrines are also objectionable. The requirements of standing traditionally were employed to close the federal courthouse to persons who had not alleged serious actual or threatened injury caused by the defendant.[122] The standing doctrine thus prevented the use of the federal judiciary to settle disputes over insubstantial or generalized grievances[123], and circumscribed opportunities for judicial oversight of the elected branches of government.[124] Many disputes will be resolved through legislative or administrative compromise if the courts desist from judicial review absent imperative circumstances.

It speaks volumes in this regard that the Nation struggled legislatively for decades over the issue of slavery in the territories with such measures as the Missouri Compromise of 1820 [125], the Wilmot Proviso[126], and the Kansas-Nebraska Act of 1854 [127] without provoking a Civil War. These compromises were generally acceptable to the Nation since they emerged from the deliberations of representatives of the people. But when an unelected Supreme Court gratuitously declared in Dred Scott v. Sanford[128] that Congress lacked authority to prohibit slavery in the territories, a long stride toward disunion had been taken. The Civil War commenced less than five years thereafter.

Despite the prudential virtues and constitutional foundation[129] of the standing doctrine, it has been reduced by the Court to a virtual formality. Insubstantial disturbance to a person's economic, social, physical, or emotional desires can trigger federal litigation.[130] In some circumstances, a litigant may have no stake in the outcome of the proceedings yet still satisfy the Court's prevailing concept of standing.[131] Furthermore, the link between the alleged injury--which can be simply aesthetic offense[132]--and the conduct assailed is a toothless requirement because the Court recognizes extremely attenuated theories of causation.[133] The standing doctrine should be reinvigorated because it helps to contain the judicial power within the bounds of Article III, and discourages government by litigation, a contemporary malaise reflected in the mushrooming caseloads of federal courts.[134]

The Supreme Court has also enfeebled the political question doctrine over the past two decades.[135] As initially elucidated by Chief Justices John Marshall and Roger B. Taney, the doctrine recognized a vast area of discretion committed by the Constitution to the elected branches of government and thus unreviewable by the judiciary. Chief Justice Marshall explained in Marbury v. Madison "that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the president possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable."[136] And in Luther v. Borden, Chief Justice Taney acknowledged the unreviewable

authority of the President to call out the militia to suppress domestic violence upon application of a state. The constitutional remedy for any abuse of this power, he explained, was confided to political processes:

> It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United

States, and must therefore be respected and enforced in its judicial tribunals.[137]

The political question doctrine, so expounded, accorded with the pervasive theme of self-government incorporated in the Constitution[138], and prevented unelected federal judges from deciding questions that the Constitution intended for resolution through political processes. Since the landmark decisions in Baker v. Carr, holding that voters may assert judicially cognizable equal protection challenges to the districting of legislative bodies[139], and Powell v. McCormack, holding that legislative decisions to exclude Congressmen from office for wrongdoing are judicially reviewable[140], however, the Court has but once[141] conceded that any question has been constitutionally withheld from the expanding judicial orbit. Revival of the political question doctrine is central to returning judicial power to the bounds of Article III.

Complementing its constitutional misinterpretations, the contemporary Supreme Court has authored doctrines of statutory construction that the Executive Branch should reprove. The doctrine of legislative acquiescence, as expounded by the Court on some occasions, enables statutes to change meaning without new legislation. The doctrine rejects the traditional axiom that the intent of the enacting Congress is conclusive regarding the proper interpretation of a statute.[142] Instead, the doctrine accepts the idea that subsequent Congresses, without amending a statute or reenacting it, and without affording the President an opportunity to exercise a veto, can alter a statute's meaning by acquiescence in or verbal applause of

interpretations made by either the Executive or Judicial Branches of government.[143] It blinks reality, however, to presume that Congress possesses the capacity, time, or interest to survey the 230,000 federal court decisions issued annually[144] and countless Executive Branch rulings[145] in order to detect errors of statutory interpretation and to repair any that are discovered.

The doctrine of legislative acquiescence misperceives Congress as an eternal body without discrete two-year sessions and elides the role of the President in the legislative process. It empowers the judiciary to fasten innumerable meanings on a statute at variance with the intent of the enacting Congress by pointing to statements made by the Executive Branch or by individual members of Congress or Committees during a subsequent Congress, or by noting the failure of Congress to pass bills that would have amended a statute that assertedly had been misinterpreted by the judiciary.[146] In so doing, the courts effect an amendment to a statute without the approval of either house of Congress or the signature of the President, in contradiction to the requirements of Article I.

Another mischievous statutory doctrine fathered by the Supreme Court is the implied private right of action. Under this doctrine, the judiciary empowers private parties to enforce regulatory statutes, despite the lack of express Congressional authorization and the presence of other express statutory remedies. Although purporting to vindicate Congressional intent, the Supreme Court has implied private rights of action by resort to inventive and fallacious assumptions.

In Merrill Lynch, Pierce, Fenner & Smith v. Curran[147], for example, the Court implied a private right of action to enforce the statutory strictures of the Commodities Futures Trading Act. Under the statute, the Commodities Futures Trading Commission is expressly empowered to remedy violations through injunctive relief and the collection of reparations on behalf of victims. States are expressly authorized to bring parens patriae actions to obtain the same type of relief. The statute is silent on whether private litigants are entrusted with enforcement rights. Writing for the majority, Justice Stevens insisted that Congress intended to create private rights of action to enforce the Act because it failed to repudiate a few court decisions endorsing such rights under a statutory predecessor to the Act.

The Merrill Lynch rationale permits the judiciary to inscribe private rights of action in statutes if Congresses subsequent to the enacting Congress fail to correct judicial error. As previously noted, however, Congress lacks the capacity, time, or interest to survey the 230,000 federal court decisions annually to unearth erroneous implications of private rights of action and to repair the judicial damage. As a practical matter, therefore, the Merrill Lynch decision endorses amendment of statutes by judicial fiat in violation of Article I.

Implied private rights of action should also be resisted because they remove substantial regulatory policymaking from agencies to private litigants and judges. Private litigants suing to rectify alleged regulatory violations develop an evidentiary record and legal arguments that are conducive to private advantage, but that may bear no relationship to

enlightened regulatory policy. Private suits, moreover, may interfere with the carefully sculpted regulatory enforcement policies of the politically accountable agency.[148]

III.

To recapitulate, the Executive Branch must inveigh against several misconceived but flourishing judicial doctrines in order to vindicate the separation of powers and to check erroneous action by the judiciary. At least two formidable myths must be exposed, however, before such criticism is likely to be seriously entertained. The first is the myth of federal judicial infallibility. The second is the myth that decisions of the Supreme Court reflect the highest norms of morality and enlightenment--and to which the Nation should aspire.

Implicit in many denunciations of the legal positions advanced by advocates who dispute the correctness of particular judicial precedents--whether hurled by academia, the press, or Congress--is the conviction that the Supreme Court flawlessly interprets the Constitution. It is often said or suggested that any questioning of a Supreme Court decision is tantamount to a breach of our duty faithfully to execute the laws.[149] Some Supreme Court Justices have promoted the notion of judicial infallibility. Associate Justice David Brewer, for example, asserted that:

> [Judges generally] are as well versed in the affairs of life as any, and they who unravel all the mysteries of accounting between partners, settle the business of the largest corporations and extract all the truth from

> the mass of sciolistic verbiage that falls from the lips of expert witnesses in patent cases, will have no difficulty in determining what is right and wrong between employer and employees, and whether proposed rates of freight and fare are reasonable as between the public and owners. . . .[150]

History, commentary, and other considerations, however, discredit the claim of judicial infallibility. Since its birth less than 200 years ago, the United States Supreme Court has overruled over 230 of its own precedents.[151] During the last decade of Earl Warren's Chief Justiceship, the Court overruled twenty-three cases, and during the first decade of Warren Burger's stewardship of the Court, twenty-four cases were overruled.[152]

In one instance, the Court conceded that for almost a century it had been unconstitutionally promulgating federal common law[153], and, in another, confessed to sanctioning unconstitutional acts of racial discrimination for over a half century.[154] Overrulings may also be swift, as in the Legal Tender Cases[155], the White Primary Cases[156], and the cases concerning the compulsory flag salute[157] and taxes on religious pamphleting.[158] Justice Roberts lamented that the frequent volte-faces of the Court tended to bring its adjudications "into the same class as a restricted railroad ticket, good for this day and train only."[159] And Justice Jackson pointed out in Brown v. Allen that if there were a super-Supreme Court, many of the decisions of the Supreme Court would be reversed, and noted

sardonically that the Supreme Court was not made final because it is infallible, but that it is infallible because it was made final.[160]

The Court's treatment of its own precedents, therefore, betrays any assertion of infallibility. As Justice Brandeis noted in Burnet v. Coronado Oil & Gas with regard to constitutional interpretation, "The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[161] The proliferation of plurality and 5-4 decisions of the Supreme Court in recent years further suggests the likelihood of erroneous decisionmaking.[162]

The causes of contemporary judicial error are threefold: insufficient time for reflection, a lack of technical expertise, and a misconception of the federal judicial mission.

Caseloads of all federal courts have mushroomed over the past decades, forcing curtailment of oral argument and resort to assembly-line procedures for disposing of cases.[163] A majority of incumbent Supreme Court Justices has stated that alleviating its caseload burden is imperative.[164] Oppressive caseloads make time for trenchant reflection and mastery of records impossible. Circuit Judge Duniway acknowledged in 1975 that the deliberative pressures on federal courts were endangering the decisionmaking process, and explained:

> When I came to the court [in 1961], I had time to not only read all of the briefs in every case I heard myself, which I still do,

> and all the motion papers...which I still do, but I could also go back to the record and I could take the time as I went along to pull books off the shelves and look at them. And then I had time, when I was assigned a case, to write. And occasionally I could do what I call 'thinking', which was to put my feet on the desk and look at the ceiling and scratch my head and say, 'How should this thing be handled?'
>
> ...Today the situation is quite different. I have a strong feeling and I know many of my brothers and sisters on the court have the same feeling--that we are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve.[165]

Justice Rehnquist also has asserted that the contemporary caseload burden on federal judges adversely affects the adjudicatory process.[166] The truncated attention Justices of the Supreme Court and their subordinate cohorts devote to cases is thus one source of judicial error.

A second source is judicial inability to comprehend complex and recondite scientific, medical, or mathematical issues frequently presented in unintelligible patois. Cases addressing the danger ascribable to specified levels of toxic substances or carcinogens[167], or the effluent or emission limitations needed to obtain industry compliance with the purity standards of the

Federal Water Pollution Control Act or Clean Air Act[168], are illustrative of this problem. A judge of the Court of Appeals for the District of Columbia Circuit has asserted that members of the court "must continually struggle to understand arcane and technical details" of agency cases.[169] And a Second Circuit Judge has indicated that appellate judges do not understand what they are doing when they review many complex agency decisions.[170] The befuddling inexactitude of many regulatory statutes[171] compounds the interpretive difficulties of judges.

The third source of judicial error derives from confusing personal notions of fairness or justice with fidelity to constitutional or statutory intent. Justice Field exhibited this confusion in Knox v. Lee when he insisted on authority to invalidate statutes that affronted his concept of justice, despite statutory consistency with the Constitution:

> For acts of flagrant injustice. . . there is no authority in any legislative body, even though not restrained by any express constitutional prohibition. For as there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny.[172]

Similarly, a Circuit Court Judge has explained his approach to adjudication as follows:

> When I get a case, I look at it and the first thing I think of automatically is what's right, what should be done--and then you look at the law to see whether or not you can do it. That might invert the process of how you should arrive at a decision, of whether you should look at the law first, but [with me] it developed through making decisions, which involves resolving problems...And I am less patient than other judges with law that won't permit what I conceive to be fair.[173]

Renowned advocate and scholar Alexander Bickel critized the preeminent influence of personal norms of fairness and right in the decisionmaking process of Chief Justice Earl Warren:

> When a lawyer stood before [Earl Warren] arguing his side of a case on the basis of some legal doctrine or other, or making a procedural point, or contending that the Constitution allocated competence over a given issue to another branch of government than the Supreme Court or to the states rather than the federal government, the chief justice would shake him off by saying, "Yes, yes, yes, but is it [whatever the case exemplified about law or about the society], is it <u>right</u>? Is it <u>good</u>?" More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of

> competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was right or good, would other institutions do so, given political realities[174]

A Circuit Judge maintains that personal norms of fairness often supersede legislative intent and case law in the decisionmaking process of many judges:

> We delude ourselves if we believe that decisions are made solely on the basis of clear judicial precedents and legislative intentions. It is rare to find two cases exactly alike, there are always differences and always judgments to make about whether those differences are important enough to produce different results. Legislative history has been described by a colleague of mine as "looking out over a crowd of people and picking out your friends." Candid appellate judges will tell you an advocate's most crucial task is to convince a court that something happened or didn't happen, in the events leading to the appeal--between the parties, in the agency, or in the trial court--that brought about an unfair or fair result, that should be affirmed or corrected. I am constantly amazed that this homey truth is not more widely recognized by lawyers--how

> many times one interrupts an argument to ask as Chief Justice Warren once did, "Is it fair," or even more modestly--why should we find your way.[175]

Statements of other judges corroborate that this description accurately reflects the decisionmaking of a large number of federal judges[176], despite a constitutional duty to rely solely on statutory or constitutional intent in adjudication. Some judges need reminding of the foremost principle that Justice Holmes in retirement avowed had guided him in deciding constitutional cases--that he had "discovered about seventy-five years ago that [he] wasn't God Almighty."[177]

To summarize, the likelihood of judicial error in statutory or constitutional interpretation is substantial because of time constraints, a weak understanding of science and technology, and an unwarranted belief that federal judges are commissioned to promote their personal ideas of fairness or justice.

Many lawyers, scholars, and pundits maintain, nevertheless, that judicial error and usurpation of policymaking power are justifiable because the decisions of the Supreme Court reflect the moral conscience of the Nation.[178] This argument for unreflective veneration of a putative celestial Court is discredited by history and, more importantly, utterly repugnant to our constitutional system.

The Court has stained the Nation's escutcheon with decisions holding that blacks are barred from United States citizenship[179] and could be excluded from party primary

elections[180]; that Congress cannot proscribe slavery in territories[181], or racial discrimination in public places[182], or private acts of violence against black citizens[183]; that the Fugitive Slave Law Act is constitutional[184], but that state laws proscribing the use of force or violence in the capture of slaves are prohibited[185]; that women may be denied the franchise[186], and access to the legal profession on account of gender,[187] and may be stripped of U.S. citizenship for marriage to an alien;[188] that segregation of blacks[189] and citizens of Chinese ancestry in public institutions[190] is constitutionally irreproachable; that federal child labor laws[191] and federal taxation of the net income derived from real or personal property[192] are unconstitutional; that citizens of Japanese ancestry may, without evidence of disloyalty, be forceably relocated during wartime[193]; that constitutional due process reprehends minimum wage and maximum work hour regulation[194], and statutes condemning "yellow dog" contracts[195]; that restrictions on an employer's right to enjoin strikes[196] and statutory awards of attorneys fees to successful plaintiffs in suits against railroads[197] violate equal protection norms, and that labor boycotts violate the Sherman Act[198]; that school children can be compelled to salute the flag[199]; that citizenship should be denied an elderly pacifist female immigrant for refusal to bear arms[200]; that greenbacks may not be made legal tender to pay debts owed in gold or silver[201]; that states may not restrict entry into the ice business[202], or regulate the price of theater tickets[203], or gasoline[204]; that the mentally retarded may be sterilized involuntarily[205]; that states may prohibit Japanese aliens ineligible for United States

citizenship from owning land[206]; that a law could apply retroactively to exclude Chinese laborers from the United States who departed the country when the law entitled them to re-entry[207]; and that newspapers may be denied postal privileges because past publications may have violated a federal law.[208]

Do these decisions embody the moral conscience of our Nation?[209]

Finally, even if Supreme Court decisions misconstruing the Constitution seem temporarily to advance some higher morality or public good, they would still blemish our legal order and endanger all law.

The fundamental principle of our republican government, as James Madison noted, is "that the majority who rule in such governments are the safest guardians both of public good and private rights".[210] As Justice Holmes observed, "the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."[211] And, as a leading constitutional scholar concluded, "[T]hat to which all our governing institutions must remain adapted if they are to retain their popular character is the dominant political forces of the country as revealed at the ballot box."[212] To circumvent these majoritarian processes established and protected by the Constitution to attain what are asserted to be desirable ends creates precedents subversive of constitutional order and liberty.[213] Noble ends do not exonerate illegitimate means. As Sir Thomas More explained:

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to

what's legal. . .I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . .What would you do? Cut a great road through the law to get after the Devil?. . .And when the last law was down, and the Devil turned round on you--where would you hide, Roper, the laws all being flat?. . . This country's planted thick with laws from coast to coast--Man's laws, not God's--and if you cut them down. . d'you really think you could stand upright in the winds that would blow then?. . . [214]

FOOTNOTES

1. Letter from Jefferson to Spencer Roane (Sept. 6, 1819), collected in 12 The Works of Thomas Jefferson 139 (P. Ford ed. 1904-05) (as quoted in 2 G. Haskins & H. Johnson, History of the Supreme Court of the United States 148 (1981) (Oliver Wendell Holmes Devise) (hereinafter "Holmes Devise")).

2. Holmes Devise, supra note 1, at 148-49; D. Malone, Jefferson the President, First Term 1801-1805 35, 207 (1970) (hereinafter "Malone"); F. Wharton, State Trials of the United States During the Administration of Washington and Adams (1849); J. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (1856); R. Johnstowne, Jefferson and the Presidency 166 (1978).

3. Letter from Jefferson to Abigail Adams (Sept. 11, 1804), collected in The Adams-Jefferson Letters: The Complete Correspondence between Thomas Jefferson and John and Abigail Adams 275, 279 (L. Cappon ed. 1959) (as quoted in Malone, supra note 2, at 155).

4. From manuscript in the Madison Papers in the Library of Congress, quoted by E. Burns, James Madison, Philosopher of the Constitution 159 (1938), in E. Corwin, Court Over Constitution, A Study of Judicial Review as an Instrument of Popular Government 23 (1938) (hereinafter "Corwin").

5. 17 U.S. (4 Wheat.) 316 (1819).

6. 2 J. Richardson, Messages and Papers of the Presidents 582 (1896) (as quoted in R. Jackson, The Struggle for Judicial Supremacy 19 (1941) (hereinafter "Jackson")).

7. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

8. Political Debates between Lincoln and Douglas 29 (Sparks ed. 1895) (cited in Jackson, supra note 6, at 31).

9. Political Debates between Lincoln and Douglas 299 (Sparks ed. 1895) (cited in Jackson, supra note 6, at 31).

10. Ch. CXI, 12 Stat. 432 (1862).

11. The Emancipation Proclamation is printed at 12 Stat. 1268 (1863).

    The Emancipation Proclamation freed all slaves in those states which had seceded from the Union and were in rebellion against the federal government on the day it was proclaimed, January 1, 1863. Arguably, Dred Scott was not applicable since it limited only Congress's power under

Article IV of the Constitution to regulate territories during peacetime; Lincoln was acting as President during a civil war, and only against those states in rebellion. On the other hand, Dred Scott might reasonably be interpreted to bar any government action that would strip slaveholders of ownership rights over their slaves. See J. Randall, Constitutional Problems Under Lincoln 365 n.47 (1963). On the legal basis of the Emancipation Proclamation generally, see id. at 342-404.

12. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

13. 6 Messages and Papers of the Presidents 24-25 (J. Richardson ed. 1898) (Special Session Message to the Senate and House of Representatives on July 4, 1861).

14. The Federalist No. 51, at 320-25 (J. Madison) (New American Library ed. 1961).

15. Letter from Rodney to President Jefferson (Oct. 31, 1868), as reprinted in 1 C. Warren, The Supreme Court in United States History 336 (1928) (as quoted in the Holmes Devise, supra note 1, at 302).

16. J. Lieberman, The Litigious Society 184 (1981). See also J. Paschal, Mr. Justice Sutherland, A Man Against the State 200 (1951) (hereinafter "Paschal"), quoting Justice Sutherland in a letter to Senator Josiah W. Baily (Jan. 13, 1937):

> There is a more or less prevalent opinion abroad in the land that some judges are ruthless from pure depravity, and are indifferent to what others think about their decisions. There may be such, although I doubt it. At any rate, I am not one of them. I think almost every man prefers approval rather than disapproval of what he does. And there is nothing wrong in the sentiment provided what he does is not influenced by his desire for approval or his fear of disapproval.

17. Jackson, supra note 6, xvii-xviii.

18. See The Federalist No. 51, at 320-25 (J. Madison) (New American Library ed. 1961) ("...[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition"; id. at 321-22).

19. Jan. 20, 1937, reprinted in The Inaugural Addresses of the American Presidents 238 (D. Lott ed. 1961). President Lincoln had made a similar observation at his First Inaugural, 76 years earlier, on March 4, 1861:

> . . . [T]he candid citizen must confess that if the policy of the government upon initial questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Id. at 121.

20. W. Taft, "Criticism of the Federal Judiciary," 29 Am. L. Rev. 641, 642-43 (1895) (as quoted in A. Mason, William Howard Taft: Chief Justice 92 (1965)).

21. Quoted in W. McCune, The Nine Young Men vii (1947).

22. Preface, Supreme Court Review (1961).

23. Frankfurter, "Press Censorship by Judicial Constitution," in Felix Frankfurter on the Supreme Court, Extrajudicial Essays on the Court and the Constitution 89 (P. Kurland ed. 1970).

24. Quoted in B. Schwartz, Superchief (to be published in 1983 by New York University Press).

25. See, e.g., Malone, supra note 2, at 114-15 (the Republicans "rightly regarded [the judiciary] as an arm of the Federalist party"). Jefferson observed, in speaking of his political foes, that, "[o]n their part, they have retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased." Id. at 458, quoting letter from Jefferson to John Dickinson (Dec. 19, 1801) (collected in 10 The Writings of Thomas Jefferson 302 (A. Lipscomb & A. Bergh eds. 1903)).

26. Ch. IV, 2 Stat. 89 (1801) (§§7 & 27).

27. Id. (§7).

28. Id. (§1).

29. 14 Annals of Congress (Gales & Seton ed. 1834), at index columns iii, viii, xxi, 92-676 (1804). See also I. Brant, Impeachment, Trials and Errors 58-83 (1972); R. Berger, Impeachment: The Constitutional Problems 224-51 (1973).

30. Malone, supra note 2, at 35, 207, 465; Holmes Devise, supra note 1, at 95, 159.

31. See D. Malone, Jefferson the President, Second Term 1805-1829 353 (1974) (quoting letter from Rodney to Jefferson (Oct. 1, 1807), collected in Jefferson Papers 30236-37 (Library of Congress)).

32. Malone, supra note 2, at 481.

Justice Felix Frankfurter also defended a comparable proposal. He supported a constitutional amendment that would empower Congress to override decisions of the Supreme Court invalidating statutes by a two-thirds majority vote. Frankfurter's support demonstrated his concern over judicial excesses that threatened to upset the equilibrium of power among the three branches of the federal government. See P. Kurland, Felix Frankfurter on the Supreme Court 158, 166-67 (1970).

33. Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

34. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

35. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). See Congressional Research Service, Library of Congress, The Constitution of the United States of America, Analysis and Interpretation 1597 (1973) (hereinafter "CRS").

36. One local ordinance and 34 state acts were invalidated during these fifty-three years. CRS, supra note 30, at 1623-29, 1768. In contrast, 188 state statutes were nullified during the sixteen years antedating the "switch in time." Note 45 infra.

37. Holmes Devise, supra note 1, at 650.

Jefferson's truculence toward the federal judiciary was not a novelty in American political life. In response to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), holding that states were not immune from federal suit initiated by private parties, the lower house of the Georgia state legislature passed a bill providing that any federal marshal or other agent of the national government who tried to execute the process served by the Supreme Court should be "declared guilty of felony and shall suffer death, without benefit of clergy, by being hanged." Quoted in C. Smith, James Wilson, Founding Father, 1742-1798 359 (1956). The minatory sanctions of the Georgia lower house were obviated by the Eleventh Amendment.

38. Perry v. United States, 294 U.S. 330 (1935); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935); Louisville Bank v. Radford, 295 U.S. 555 (1935); United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co.

v. Ryan, 293 U.S. 388 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

39. Bill transmitted to 75th Cong., 1st Sess., H.R. Doc. No. 142 on Feb. 5, 1937; reprinted in 81 Cong. Rec. 880-81 (1937).

40. Address of President Roosevelt broadcast from the White House (Mar. 9, 1937) (reprinted in Jackson, supra note 6, at 340-51).

41. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Carolene Products Co., 304 U.S. 144 (1938).

42. NLRB v. Jones &. Laughlin Steel Corp., 301 U.S. 1 (1937).

43. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

44. From 1933 until West Coast Hotel Co. v. Parrish, 300 U.S. 379, in 1937, the Supreme Court overruled five cases; from 1937 to 1941, it overruled 29, including: Adkins v. Children's Hosp., 261 U.S. 525 (1923); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918); Carter v. Carter Coal Co., 298 U.S. 238 (1936); and Ribnik v. McBride, 277 U.S. 350 (1928). See CRS, supra note 35, at 1791-93. From 1942 to 1947, it overruled 19 more. See id. at 1793.

45. In the sixteen years before West Coast Hotel Co. in 1937, the Court struck down 188 state statutes; in the 16 years after West Coast Hotel Co., only 80 state statutes were struck down. The drop was even more precipitous in this period for acts of Congress struck down. From 1921 to West Coast Hotel Co., 28 were invalidated; afterwards, through 1953, only three were. See id. at 1673-1750, 1605-13.

46. See TAN 38-45.

Note also that the Radical Reconstruction Congress reduced the size of the Supreme Court to prevent President Andrew Johnson from filling vacancies with persons hostile to its Reconstruction Program, and then augmented the number of Supreme Court seats to authorize Johnson's successor, Ulysses S. Grant, to appoint two Justices who would uphold legal tender legislation that had recently been declared unconstitutional by a 5-3 vote. See Hepburn v. Griswold, 75 U.S. (Wall.) 603 (1870), rev'd by Knox v. Lee, 79 U.S. (12 Wall.) (1871). Congress lowered the size of the Court from 10 to seven in 1866, and, in 1869, with Grant safely in the White House, augmented the Supreme Court membership to nine, where it has remained ever since. "Supreme Court Succession, or Who Succeeded Whom," The Supreme Court Quarterly, Summer 1982, at 7.

47. See TAN 28, supra.

48. See TAN 26, supra.

49. See TAN 29-30, supra.

The last federal judge impeached was Halsted Ritter in 1936. See 80 Cong. Rec. 5469, 5602-06 (1936). See also R. Berger, Impeachment: The Constitutional Probelms 56, 92-93, 96, 199 (1973).

50. 29 U.S.C. §§ 101-115. The Act circumscribed authority of federal courts to issue restraining orders and temporary or permanent injunctions in cases involving labor disputes; it also made unenforceable in federal courts any yellow-dog contracts. When the Act was passed, on March 23, 1932, the Supreme Court had held that state legislation similarly restricting employers' remedies to be a denial of due process (Truax v. Corrigan, 257 U.S. 312 (1921)), and that yellow-dog contracts also violated the due process clause, whether enacted by a state (Coppage v. Kansas, 236 U.S. (1915)), or Congress (Adair v. United States, 208 U.S. 161 (1908)).

51. See, e.g., Tennessee Valley Authority Act of 1933, Ch. 32, 48 Stat. 58 (May 18, 1933); National Labor Relations Act, Ch. 372, 49 Stat. 449 (July 5, 1935); Social Security Act, Ch. 531, 49 Stat. 620 (Aug. 14, 1935); Public Utility Holding Company Act, Ch. 687, 49 State. 803 (Aug. 26, 1935); Railroad Retirement Act of 1935 and 1937, Ch. 812, 49 Stat, 967 (Aug. 29, 1935) and Ch. 382, 50 Stat. 307 (June 24, 1937); Guffey-Snyder Coal Act, Ch. 824, 49 Stat. 991 (Aug. 30, 1935); Agriculture Adjustment Act of 1937 and 1938, Ch. 296, 50 Stat. 246 (June 3, 1937) and Ch. 30, 52 Stat. 31 (Feb. 16, 1938); Fair Labor Standards Act, Ch. 676, 52 Stat. 1060 (June 25, 1938).

See also Paschal, supra note 16, at 187-88.

52. Commager, "The Quiet Assault on America's Constitution," L.A. Times, Oct. 17, 1982, § 4, at 3.

It is also noteworthy that Assistant Attorney General William Baxter was recently called on to resign by Senator Howard Metzenbaum substantially because of the former's avowed refusal to place at the apex of the Antitrust Division's enforcement priorities the prosecution of vertical price restraints held to be per se violations of the Sherman Act in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). See transcript of exchange between Mr. Baxter and Sentor Metzenbaum before the Senate Judiciary Committee (Sept. 9, 1982) (on file with the Antitrust Division, U.S. Dep't of Justice).

53. Perhaps what best captures the contemporary portrait of judicial activism is a recent decision by a Georgia trial

court that emerged from a Manichaean struggle between two high school football teams. A referee erred in assessing a penalty for roughing the kicker against an awesome 11 playing for Osborne High School, the loser in a game with Lithia Springs. The parents of the aggrieved Osborne 11 implored a state court to redress the harm that had befallen their brawny progeny because of the referee's ineptitude. The court held that the parents had a "property right in the game of football being played according to the rules and that the referee denied plaintiffs and their sons this property right and equal protection of the laws by failing to correctly apply the rules."

The trial court then entered an order on November 13, 1981, cancelling a play-off game between Lithia Springs High School and Campbell High School scheduled for the evening. It ordered that Lithia Springs and Osborne "meet on the football field on November 14, 1981 at an agreed upon time between the parties and resume play at the Lithia Springs 38-yard line with the ball being in possession of [Osborne] and it be first down and ten yards to go for a first down and that the clock be set at seven minutes one second to play and that the quarter be designated as the fourth quarter."

This judicial extravagance was overturned by the Georgia Supreme Court in Georgia High School Ass'n v. Wadell, 248 Ga. 542, 285 S.E. 2d 7 (Ga. 1981).

54. See CRS, supra note 35, & 1982 supplement (forthcoming), at 1605, 1617-19, 1760-68, 1785 (34 national laws, 182 state laws, and 13 local laws struck down between 1970 and 1979); id. at 1614-18, 1736-60, 1783-84 (20 national laws, 189 state laws, and 9 local laws struck down between 1960 and 1969); id. at 1607-12, 1688-1708, 1775-76 (17 national laws, 120 state laws, and 8 local laws struck down between 1927 and 1937).

55. Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982).

56. Furman v. Georgia, 408 U.S. 238 (1972); Woodson v. North Carolina, 428 U.S. 280 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Godfrey v. Georgia, 446 U.S. 420 (1980); Beck v. Alabama, 447 U.S. 625 (1980).

57. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Colautti v. Pennsylvania, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979).

58. Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services Int'l, 431 U.S. 678 (1977).

59. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Bd. of Pharmacy v. Virginia Citizens Congressman Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); In the Matter of R___ M. J_____, 102 S. Ct. 929 4185 (1982).

60. Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Levitt v. Committee for Public Ed. and Religious Liberty, 413 U.S. 472 (1973); Committee for Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

61. McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 403 (1971).

62. The seminal case is Goldberg v. Kelly, 397 U.S. 254 (1970) (broad adversary hearing required prior to termination of public assistance payments). Cases spawned by Goldberg include Department of Agriculture v. Murry, 413 U.S. 508 (1973) (voiding food stamp program provisions making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps on the grounds that it created a conclusive presumption that fairly would be shown to be false if evidence could be presented); Goss v. Lopez, 419 U.S. 565 (1975) (holding that state statutes providing for the education of all residents between 5 and 21 years of age and compulsory-attendance at school endows students with property rights protected by the due process clause of the Fourteenth Amendment).

    See also TAN 110-11, infra. The cases discussed in note 110 involving the hearing requirements before revocation of state-granted jobs, licenses, or other privileges are, of course, directly analogous. Cases addressing liberty or property rights lacking origin in state or federal law yet protected by due process are important since the principles developed there have influenced the development of due process for statutory rights.

63. See CRS, supra note 35 (1982 supplement) (forthcoming).

64. Remarks of Justice William J. Brennan, Jr., Third Circuit Judicial Conference (Sept. 9, 1982) (p. 14 of prepared remarks) (emphasis added).

    Justice Brennan has also written:

> Our framework [for analyzing the inequities in our present legal system] is the activist philosophy of government that emerged from the depression of the 1930's. Our governmental response to that great crisis marked our beginnings as what has been called a "Positive State." The positive state conceives of government as having an affirmative role -- a positive duty to make provisions for jobs, social security, medical care, housing and thereby giving real substance to our cherished values of liberty, equality and dignity. If I may adapt the suggestion of one commentator, Arthur Selwyn Miller, this is a duty rather similar to that expressed in the Universal Declaration of Human Rights . . . . In that Declaration, certain economic and social rights are stated. For example, the rights to work, to equal pay for equal work, to rest and leisure, to an adequate standard of living, to education, to participate in the cultural life of the community. Utopian though it may be, unratified by the United States as it is, unfulfilled for most of the peoples of the world, the Declaration nonetheless helps point the way in which law and, I hope, society are moving.
>
> Essentially, of course, these goals recognize the necessity for, and determination to achieve, equal rights for all, protection of the underdog and respect for the dignity of man in a confusing complex society. The ceaseless insistence of the disaffected upon their right to share these values means that law and lawyers can no longer eschew a role in perfecting the use of government as a social instrument.

Brennan, Convocation Address, 44 Notre Dame Law. 1029, 1030 (1969)(footnotes omitted.)

65. U.S. Const. art. V. provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first

> and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

There is abundant evidence that the amendment process, not the Supreme Court, was to be the mechanism for altering the powers or limits of government under the Constitution. Hamilton, in his exposition of judicial review in The Federalist No. 78, at 470 (American Library Ed. 1961), stated: "Until the people have, by some solemn and authoritative act, annulled or changed the established form [of the Constitution], it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act." (This reasoning of course applies equally to the power of the Supreme Court to change the meaning of the Constitution.) According to Madison's notes at the convention, "Col. Mason urged the necessity of such [an amendment] provision. The [constitutional] plan now to be formed will certainly be defective, as the [Articles of Confederation have] been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence." 1 M. Farrand, The Records of the Federal Convention of 1787 202-03 (1966). Madison also noted that Hamilton said, in support of the amendment process, "It was . . . desirable now that an easy mode should be established for supplying defects which will probably appear in the new system." 2 id. at 558. The Committee of Detail reported that "[t]his Constitution ought to be amended whenever such amendment should be necessary," 2 id. at 159, 174. Charles Jarvis thought that "we have in this article [V] an adequate provision for all purposes of political reformation," 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 116 (1974) (hereinafter "Elliot"), and, in the First Congress, Elbridge Gerry said, "The people have [directed a] . . . particular mode of making amendments, which we are not at liberty to depart from . . . . Such a power [to alter] would render the most important clause of the Constitution nugatory." 1 Annals of Congress 503 (Washington et al. ed. 1834).

Perhaps the best proof that amendment through Article V was intended as the exclusive medium of change is the fact that when the First Congress wished to safeguard precious individual liberties they resorted to the amendment process and obtained ratification of the Bill of Rights. The history of the Bill of Rights is barren of any suggestion that imaginative interpretations of the Constitution by the Supreme Court might serve as a substitute. The Supreme Court itself has long recognized that the actions of the First Congress are entitled to especially great weight in

the explication of the Constitution, since it included many luminaries who participated in the Constitutional Convention. See, e.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 420 (1821); Burroughs-Giles Lithographing Co. v. Sarony, 111 U.S. 53, 57 (1884); Ames v. Kansas, 111 U.S. 449, 463-69 (1884); The Laura, 114 U.S. 411, 416 (1885); Wisconsin v. Pelican Ins. Co., 121 U.S. 265, 297 (1888); Knowlton v. Moore, 178 U.S. 41, 56 (1900); Fairbank v. United States, 181 U.S. 283, 309 (1901); Myers v. United States, 272 U.S. 52, 175 (1926).

Nowhere, in The Federalist Papers or in Farrand's or Elliot's volumes or elsewhere in the early history of the Republic, can be found an assertion that the Supreme Court was to revise its interpretation of the Constitution in light of perceived contemporary needs. (On the contrary: see TAN 67, 100-01 and accompanying footnotes, infra.) Thus, Professor Raoul Berger concludes, "Article V constitutes the exclusive medium of change, under the long-standing maxim that to name a particular mode is to exclude all others." R. Berger, Government by Judiciary 318 (1977) (emphasis in the original) (footnote omitted).

66. See discussion at note 65, supra. See also Chicago, Milwaukee & St. Paul Ry. v. Minneapolis, 134 U.S. 418, 466 (1890) (Bradley, J., dissenting):

> It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the Constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers. . . .

67. Letter from Jefferson to Wilson C. Nicholas (Sept. 7, 1803), collected in 10 The Works of Thomas Jefferson 10-11 (P. Ford ed. 1904-05) (as quoted in the Holmes Devise, supra note 1, at 29).

68. See notes 71-76 and accompanying text, infra.

69. See notes 77-79 and accompanying text, infra.

70. See notes 80-81 and accompanying text, infra.

71. Reynolds v. Sims, 377 U.S. 533 (1964).

72. Roe v. Wade, 410 U.S. 113 (1973). An equivalent right in the abortion decision has been denied the father and the parents of minor girls. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

73. The seminal cases on this point are Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), and United States v. Guest, 383 U.S. 745 (1966). See also Edwards v. California, 314 U.S. 160 (1941); Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

74. Stanley v. Georgia, 394 U.S. 557 (1969).

75. Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of convict held violative of equal protection); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives may not be denied married persons); Roe v. Wade, 410 U.S. 113 (1973) (abortion is within the privacy "penumbra").

The criticism of these decisions is not necessarily with the ultimate conclusions, but with the doctrines erected to justify such results. Cf. note 209 infra.

76. Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives may not be denied married persons); Loving v. Virginia, 388 U.S. 1 (1967) (anti-miscegenation law held unconstitutional); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (striking down law banning contraceptive advertising and display, sales to minors, and sales to anyone except by licensed pharmacists); Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down law requiring court approval order for marriage of resident having minor issue not in his custody and which he is under obligation to support by any court order or judgement). See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (in dicta, listing marriage among "the basic civil rights of man").

77. Graham v. Richardson, 403 U.S. 365 (1971); In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973). See also Plyler v. Doe, 50 U.S.L.W. 4650 (U.S. June 15, 1982). But cf. Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 50 U.S.L.W. 4095 (U.S. Jan. 12, 1982).

78. Hunter v. Erickson, 393 U.S. 385 (1969); Keyes v. School Dist., 413 U.S. 189 (1973).

79. Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Hirabayashi v. United States, 320 U.S. 81 (1943).

80. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Taylor v. Louisiana, 419 U.S. 522

(1975); Caban v. Mohammed, 441 U.S. 380 (1979); Kulko v. Superior Court of Cal., 436 U.S. 84 (1978); Orr v. Orr, 440 U.S. 268 (1979); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Mississippi Univ. for Women v. Hogan, 50 U.S.L.W. 5068 (U.S. July 1, 1982).

81. Mathews v. Lucas, 427 U.S. 495 (1976). See also Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972); Richardson v. Davis, 409 U.S. 1069 (1972), aff'g 342 F. Supp. 588 (D. Conn.); Richardson v. Griffin, 409 U.S. 1069 (1972), aff'g 346 F. Supp. 1226 (D. Md.); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Trimble v. Gordon, 430 U.S. 762 (1977).

82. See, e.g., Roe v. Wade, 410 U.S. 113 (1973).

83. See, e.g., In re Griffiths, 413 U.S. 717 (1973).

84. See, e.g., Craig v. Boren, 429 U.S. 190 (1976).

85. Exceptions include: Sosna v. Iowa, 419 U.S. 393 (1975) (travel); Maher v. Roe, 432 U.S. 464 (1977) (abortion); Harris v. McCrea, 448 U.S. 297 (1980) (abortion); Califano v. Jobst, 434 U.S. 47 (1977) (marriage).

86. Exceptions include: Kahn v. Shevin, 416 U.S. 351 (1974) (sex); Rostker v. Goldberg, 453 U.S. 57 (1981) (sex); Labine v. Vincent, 401 U.S. 532 (1971) (illegitimacy); Mathew v. Lucas, 427 U.S. 495 (1976) (illegitimacy).

87. Korematsu v. United States, 323 U.S. 214 (1944), appears to be the sole example of a racial classification successfully withstanding strict scrutiny. For alienage, the exceptions include: Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 50 U.S.L.W. 4095 (U.S. Jan. 12, 1982).

88. U.S. Const. amends. XV, XIX, XXIV, XXVI.

89. The most salient legislative history of the Fourteenth Amendment is collected in B. Schwartz, Statutory History of the United States, Civil Rights, Part I (1970) (hereinafter "Civil Rights"). See also J. James, The Framing of the Fourteenth Amendment (1956); H. Flack, The Adoption of the Fourteenth Amendment (1965). For instance, the joint sub-committee instructed to draft the amendment was told that "[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color," Civil Rights, supra this note, at 187 (emphasis added); in the House floor debates, Representative Higby stated that laws "must be administered equally to all classes, without regard to color or race" id. at 196

(emphasis added); in the Senate floor debates, Senator Howard stated that the amendment

> prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield it throws over the white man. Is it not time, Mr. President, that we extended to the black man, I had almost called it the poor privilege of the equal protection of the law?

Id. at 261.

The early Supreme Court cases recognized the Fourteenth Amendment's central concern for racial equality. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Strauder v. West Virginia, 100 U.S.(10 Otto) 303 (1880).

90. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938); Graham v. Richardson, 403 U.S. 365, 372 (1971). See also Minersville School Dist. v. Gobitis, 310 U.S. 586, 606 (1940) (Stone, J., dissenting); Oregon v. Mitchell, 400 U.S. 112, 295 n.14 (1970) (Stewart, J., concurring in part and dissenting in part); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

91. Jefferson was consistently of the view that the states were to be the primary protectors of our liberties. See, e.g., Malone, supra note 2, at 23, 102. See also The Federalist Nos. 27 & 28, at 174-82 (A. Hamilton) (New American Library ed. 1961); B. Schwartz, The Bill of Rights: A Documentary History 1031-32 (1971)(hereinafter "Schwartz")(relating Madison's statement in the First Congress that states were the defenders of freedom).

92. At the Convention, Madison viewed an enlarged electorate as a bulwark against faction and oppression, 1 M. Farrand, The Records of the Federal Convention of 1787 134-35 (1966).

93. In The Federalist No. 27, Hamilton stressed the moderating influence which the Senate, selected "through the medium of the State legislatures," would have, id. at 174-75 (New American Library ed. 1961), and in No. 73 stressed the need for a presidential veto to further restrain the legislature, id. at 442-47. James Wilson at the convention extolled a divided legislature as an essential safeguard against "despotism," id. at 261. Oliver Ellsworth -- another member of the Constitutional Convention, and later Chief Justice of the Supreme Court -- emphasized in Philadelphia the role of the Senate, with its constituency distinct from the House of Representatives', in protecting against an abuse of power by the majority. See W. Brown, The Life of Oliver Ellsworth 140 (1905) (hereinafter "Brown")("The capital objection . .

., that the minority will rule the majority, is not true. The power is given to the few to save them from the many"). In the First Congress, Representative James Jackson emphasized the safeguard of frequent elections in protecting our liberties. Schwartz, supra note 91, at 1034.

94. The Federalist Nos. 9 & 10, at 71-84 (J. Madison) (New American Library ed. 1961). Later, Oliver Ellsworth, in a charge to a grand jury, spoke of the dangers of "[i]mpetuosity in legislation," and our republic's security against it "by a representative instead of the aggregate, and by a distribution of the legislative power to maturing and balancing bodies, instead of the subjection of it to momentary impulse, and the predominance of faction." Brown, supra note 93, at 247.

95. See id. Nos. 47-53, at 300-36 (J. Madison). The historical context of the Constitution must be kept in mind: the Framers' experience with tyranny had been recent and vivid, and a Revolution had recently been concluded to entrust power to the electorate. As the author of the Declaration of Independence had concluded, "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants." Letter from Thomas Jefferson to W.S. Smith (Nov. 13, 1787), collected in 4 Writings of Thomas Jefferson 466-67 (P. Ford ed. 1897-99) (as quoted in D. Malone, Jefferson and the Rights of Man 165-66 (1951) (emphasis added)). In the Declaration of Independence itself the "tyranny" of George III is cited four times as the Revolution's raison d'etre; in The Federalist it is mentioned at least 16 times (see The Federalist, at 559 (New American Library ed. 1961) (index)).

It is not surprising, then, that two dominant themes in The Federalist were, first, that the people must rule, but, second, that tyranny by a majority is tyranny nonetheless. To this end, then, an intricate system of checks and balances on the majority power was designed. ("By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority . . .," id. No. 78, at 466 (A. Hamilton)). This system, however, does not gain say the fact that power was ultimately to reside in the people, and that it was only the people's tyrannical abuse of that power which justified the obstruction of their will.

The defense of judicial review was couched in these limited terms by James Iredell, who was a delegate to the Constitutional Convention and later a Justice of the Supreme Court: Iredell's [statement at the Convention] was a

> lucid presentation of the point of view of those in favor of judicial review. Under no circumstances was the legislature's power to be absolute. The Constitution, Iredell argued, was the fundamental law of the

> state, limiting the powers of the legislature. If an act of the legislature violated the Constitution it was up to the judges to declare it unconstitutional. As to Spaight's fear of tyranny by judicial rule, Iredell admitted it to be possible, but he felt it was not probable. Iredell was motivated primarily by a fear of unrestrained majority rule--tyranny by the majority. "If there be no check upon the public passions," he wrote, "it [government] is in the greatest danger. The majority having the rule in their own hands may take care of themselves; but in what condition are the minority, if the power of the other is without limit?"

R. Ellis, The Jeffersonian Crisis, Courts and Politics in the Young Republic 8-9 (1971) (emphasis added) (footnote omitted). Indeed, Hamilton's justification of judicial review in The Federalist No. 78 begins with an example where the legislature has in fact acted inconsistently with the desires of the people -- tyranny of a very explicit sort. When he later moves on to discuss an example where the Constitution has been violated by the legislature with the support of the people, it is clear he is writing about an extraordinary situation:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with the enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually, and no presumption, or even knowledge of their sentiments, can

warrant their representatives in a departure from it prior to such an act.

Id. at 471-72 (New American Library Ed. 1961) (footnote omitted).

On the limited role intended for judicial review, see also notes 65, 66, 94 supra, and notes 136-37, infra.

96. Schwartz, supra note 91, at 1008, 1031.

97. See note 95, supra.

Finally, of course, the limited role for the judiciary was implicit in the fact that "many of the most important acts of [the legislature are] . . . judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens[.]" The Federalist No. 10, at 79 (J. Madison) (New American Library ed. 1961).

On the limited role of the judiciary, see also Luther v. Borden, 48 U.S. (7 How.) 1 (1849), and Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827), discussed at notes 136-37 and accompanying text, infra. In short, while there was substantial discussion among the Framers on how to forestall abuse of power by the majority, the Supreme Court was not a premier player in the constitutional script.

98. Quoted in Schwartz, supra note 91, at 1000-01 (from 14 The Papers of Thomas Jefferson 686-89).

99. Jackson, supra note 6, at 321.

100. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

101. "It is jealousy and not confidence which precribes limited constitutions to bind down those whom we are obliged to trust with power. ... In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." 4 Elliot, supra note 65, at 543.

Remarking on Congress and the Constitution, Jefferson similarly stated, "It [the Constitution] was intended to lace them [Congress] up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect." The Writings of Thomas Jefferson 286 (P. Ford ed. 1892-99) (as quoted in D. Malone, Jefferson and the Rights of Man 343 (1951)). Jeffersonian scholar Dumas Malone wrote, "Regarding constitutions as shields against arbitrary power, [Jefferson] was disposed to interpret all of them strictly." D. Malone, Jefferson and the Ordeal of Liberty 402 (1962).

Jefferson's contemporaries shared his view. At the Virginia Ratification Convention, Francis Corbin stated, "Liberty is secured, sir, by the limitation of [the government's] powers, which are clearly and unequivocally defined." 3 Elliot, supra note 65, at 110. And, in the First Congress, James Jackson said: "[W]e must confine ourselves to the powers defined in the constitution, and the moment we pass it, we take an arbitrary stride towards a despotic Government." 1 Annals of Congress 438 (Gales & Seaton eds. 1834). With regard to the judiciary in particular, Alexander Hamilton wrote: "To avoid an arbitrary discretion in the courts, it is essential that they be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ." The Federalist No. 78, at 471 (New American Library Ed. 1961). Professor Raoul Berger has skillfully marshalled the similar opinions of other Framers on the need for strict fidelity to a written Constitution in Government by Judiciary 249-99 (1977) (see especially id. at 252-53 n.16, 288 n.19, and sources cited therein).

102. L. Hand, The Spirit of Liberty 306-07 (I. Dillard ed. 1960).

103. Corwin, supra note 4, at 29.

104. 96 U.S. 595, 604 (1878).

105. The most powerful statement of this thesis was made by Justice Holmes. See, e.g., Otis v. Parker, 187 U.S. 606 (1903); Lochner v. New York, 198 U.S. 45 (1905) (in dissent). See also discussion at TAN 167-172, infra, of how the confusion of personal notions of fairness with principled judicial decision-making is a source of error in expounding the law.

106. See Corwin, supra note 4, at 83.

107. See cases cited at note 110, infra. For an excellent criticism of the Court's attachment of procedural guarantees to statutory entitlements, see Easterbrook, "Substance and Due Process," 1982 Sup. Ct. Rev. ____ (forthcoming).

108. Perry v. Sinderman, 408 U.S. 593 (1972).

109. Goss v. Lopez, 419 U.S. 565 (1975).

110. Compare Board of Regents v. Roth, 408 U.S. 564 (1972) (teacher at state university not deprived of "property" without due process when contract not renewed and no hearing provided); with Perry v. Sinderman, 408 U.S. 593 (1972) (teacher whose contract not renewed entitled to prove claim that college had fostered the understanding that persons in his position would enjoy continued employment absent "sufficient cause"); and Arnett v. Kennedy, 416 U.S. 134

(1974) (rejecting claim, of nonprobationary OEO employee discharged for cause, that the statutory hearing procedures were constitutionally inadequate).

Compare Vlandis v. Kline, 412 U.S. 441 (1973) (though a student may have had a legal address outside the state at the time of his college application or at some point during that year, he must be afforded an opportunity to show he has become a state resident, and thus entitled to lower tuition); Department of Agriculture v. Murry, 413 U.S. 508 (1973) (food stamp program may not make automatically ineligible any household that contained a member 18 years old or over who was claimed as a dependent for federal income tax purposes the prior year by a person not himself eligible for stamps); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory maternity leave rules of school boards requiring pregnant teachers to take unpaid maternity leave 4 - 5 months prior to date of expected birth date voided since it created irrebutable presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of continuing); and Turner v. Department of Employment Sec., 423 U.S. 44 (1975) (invalidating state statute making pregnant women ineligible for unemployment compensation for a period extending 12 weeks before the expected birth until six weeks after childbirth); with Weinberger v. Salfi, 422 U.S. 749 (1975) (sustaining a Social Security Act provision limiting eligibility for benefits as a deceased spouse to those persons who were married at least nine months before their deaths, in order to disqualify those persons entering into marital relationships solely to become eligible for benefits upon the expected death of the insured; the Court stated that to hold otherwise would be to create "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments...," id. at 772).

See also Willner v. Committee on Character, 373 U.S. 96 (1963) (before one may be denied admission to the bar, one must be afforded an opportunity to be heard on the charges filed before the investigating committee and to rebutt adverse allegations); Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father with visitation rights whose whereabouts are known must be given notice of and may disapprove adoption, though consent is not required if he did not substantially contribute to the support of the child); Sniadach v. Family Finance Co., 395 U.S. 337 (1969) (hearing required before wage garnishment); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (opportunity for hearing and rebuttal must be provided before one can be labelled an "excessive drinker" and barred from places where alchohol is served); Bell v. Burson, 402 U.S. 535 (1971) (uninsured motorist involved in a collision must be afforded an opportunity to raise the issue of liability prior to

suspension of his registration and license); Stanley v. Illinois, 405 U.S. 645 (1972) (unfitness of unwed father for custody must be proved on a case by case basis); Fuentes v. Shevin, 407 U.S. 67 (1972) (hearing required before replevin); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) (hearing required before sequestration of personal property); Morrissey v. Brewer, 408 U.S. 471 (1972) (hearing required prior to revocation of parole); Wolff v. McDonnell, 418 U.S. 539 (1974) (hearing required prior to revocation of prisoner's "good-time" credits); North Ga. Finishing v. Di-Chem, 419 U.S. 601 (1975); Barry v. Barchi, 443 U.S. 55 (1979) (timely hearing required after suspension of horse trainer for drugging horses).

See also cases cited at note 55, supra.

111. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage regulation); United States v. Carolene Products Co., 304 U.S. 144 (1938) (rejecting due process challenge to federal prohibition of industrial shipment of "filled milk"); Olsen v. Nebraska, 314 U.S. 236 (1941) (upholding statute fixing maximum fee an employment agency could collect from an employee); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (sustaining state prohibition of closed shops); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (sustaining law allowing employees four hours' leave with full pay on election day); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (sustaining Oklahoma law allowing only licensed optometrists and opthamologists to fit and replace eyeglasses); Ferguson v. Skrupa, 372 U.S. 726 (1963) (sustaining Kansas statute prohibiting anyone except lawyers from engaging in the business of debt adjusting).

112. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

113. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (striking down New York labor law limiting the working hours of bakery employees); Adair v. United States, 203 U.S. 161 (1908) (striking down federal statute prohibiting "yellow dog" contracts); Coppage v. Kansas , 236 U.S. 1 (1915) (same for state statute); Adams v. Tanner, 244 U.S. 590 (1917) (striking down state law prohibiting maintenance of private employment agencies); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down federal Child Labor Law); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (striking down federal Child Labor Tax Act); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating District of Columbia minimum wage law for women); Wolff Packing Co. v. Industrial Court, 262 U.S. 522 (1923) (Kansas law compelling food processing company to continue operation during strike and submit to binding arbitration or issue of minimum wages held violative of due process) (accord: Dorchy v. Kansas, 264 U.S. 286 (1924) (same Kansas law voided when applied to

labor disputes affecting coal miners); Wolff Packing Co. v. Industrial Court, 267 U.S. 552 (1925) (voiding other provisions of this Kansas law which authorized arbitration tribunal, in the course of compulsory arbitration, to fix the hours of labor to be observed by an employer involved in a labor dispute)); Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926) (California law whereunder private carriers by automobile for hire could not operate over California highways between fixed points in the state without obtaining a certificate of convenience and submitting to regulation as common carriers exacted an unconstitutional condition and effected a denial of due process); Tyson & Bro. v. Banton, 273 U.S. 418 (1927) (legislature may not set maximum charge for resale of theater tickets); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928) (striking down Kentucky tax levy on the registration of mortgages in which the maturity period was over five years); Nectow v. City of Cambridge, 277 U.S. 183 (1928((striking down zoning ordinance); Ribnik v. McBride, 277 U.S. 350 (1928) (legislature may not set maximum charge for services of an employment agency); Liggett Co. v. Baldridge, 278 U.S. 101 (1928) (invalidating Pennsylvania law requiring the owners of drug stores, or owners of stock in corporations which operated them, to be registered pharmacists); Williams v. Standard Oil Co., 278 U.S. 235 (1929) (legislature may not set maximum charge for sale of gasoline); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (invalidating Oklahoma law requiring state licensing for ice manufacturers, sellers, and distributors).

The Court's rulings during this era were occasionally beset with legal schitzophrenia (cf. TAN 110). Compare Lochner with Holden v. Hardy, 169 U.S. 366 (1898) (upholding an eight-hour workday limitation for mining and smelting employees); and Bunting v. Oregon, 243 U.S. 426 (1917) (sustaining ten-hour maximum workday for male factory employees); compare Coppage with Muller v. Oregon, 208 U.S. 412 (1908) (upholding a statute limiting the working hours of women in factories and laundries).

114. That this doctrine has been intellectually discredited is argued eloquently by Attorney General -- later Justice -- Robert Jackson in the final chapter of The Struggle for Judicial Supremacy 311-27 (1941).

The writers of most constitutional law textbooks agree. See, e.g., G. Gunther, Cases and Materials on Constitutional Law 591 (1975) ("The modern Court has turned away due process challenges to economic regulation with a broad 'hands off' approach. No such law has been invalidated on substantive due process grounds since 1937"); W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law Cases -- Comments -- Questions 461 (1970) ("From Lochner in 1905 to Nebbia in 1934, . . . the Supreme Court frequenty substituted its

judgment for that of Congress and the state legislatures on the wisdom of economic regulation . . ."; "A few examples will suffice to show the extent to which the Court interferred with legislative policymaking in economic regulation").

See also the cases cited in note 111, supra;

115. Moore v. City of East Cleveland, 431 U.S. 494 (1976).

116. Youngberg v. Romeo, 50 U.S.L.W. 4681 (U.S. June 18, 1982).

117. Griswold v. Connecticut, 381 U.S. 479 (1965).

118. See note 46, supra, for a discussion of substantive due process in the context of high school football. See also Wyatt v. Stickney, 325 F. Supp. 281, 784 (M.D. Ala. 1971), aff'd 503 F.2d 1305 (5th Civ. 1974) (declaring for patients civilly committed to state institutions a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be curred or to improve his or her mental condition); Solem v. Helm, 684 F.2d 582, 587 (8th Cir. 1982), cert. granted, ___ U.S.L.W. ___ (Nov. 9, 1982) (life sentence for seven-time convicted felon -- three times for third degree burglary, and once each for driving while intoxicated, grand larceny, obtaining money under false pretenses, and writing a bad check -- held "so grossly disproportionate to the nature of the offense that its imposition constitutes cruel and unusual punishment in violation of the eight and fourteenth amendments").

This is true for federal and state courts, and for "fundamental rights" and "suspect classifications" as well as substantive due process. See e.g., Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972) (ordinance forbidding administering a massage to a person of the opposite sex violates the "fundamental right" to pursue a lawful occupation); Jones v. United States, 411 A.2d 624 (D.C. Ct. App.), vacated, 432 A.2d 364 (D.C. Ct. App. 1980) (en banc), cert. granted, 102 S. Ct. 999 (1982) (commitment of defendant found not guity of petit larceny by reason of insanity, for longer than the period for which he would have been imprisoned, held a violation of equal protection).

There are also recent lower court decisions with a pedigree in economic substantive due process. Milnot Co. v. Richardson, 350 F. Supp. 221 (S.D. Ill. 1972) (invalidating Filled Milk Act on grounds it had become irrational -- this suit was brought by Carolene Products' successor company!). See also the commercial speech cases of the Supreme Court, note 59, supra.

119. The Court's opinion in Moore v. City of E. Cleveland, 431 U.S. 494 (1977), for instance, cited to neither the text of

the Constitution nor to the intent of the Framers in reaching its holding that an East Cleveland housing ordinance limiting occupancy of a dwelling unit to members of a single family was unconstitutional.

120. See, e.g., Flast v. Cohen, 392 U.S. 83 (1968); Sierra Club v. Morton, 405 U.S. 727 (1972); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); United States v. SCRAP, 412 U.S. 669 (1973); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

The standing of states to represent their citizens has, concurrently, expanded as well. Compare Massachusetts v. Mellon, 262 U.S. 447 (1923), with Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 50 U.S.L.W. 5035 (U.S. July 1, 1982).

121. Baker v. Carr, 369 U.S. 186 (1962); Powell v. McCormack, 395 U.S. 486 (1969).

122. See, e.g., Massachusetts v. Mellon, 262 U.S. 447 (1923), and its companion case, Frothingham v. Mellon, 262 U.S. 447 (1923); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Doremus v. Board of Educ., 342 U.S. 429 (1952).

123. De Tocqueville commented on the salutary political benefits reaped by the concrete injury ingredient of standing. Addressing the role of American courts, he noted:

> It will be seen, also, that by leaving it to private interest to censure the law, and by ultimately uniting the trial of the law with the trial of the individuals, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislation are exposed only to meet a real want; and it is always a positive and appreciable want that must serve as the basis for a prosecution.

1 De Tocqueville, Democracy in America 102 (1945). See also Ashwander v. TVA, 297 U.S. 288, 345-56 (1936) (Brandeis, J., concurring), and cases cite therein; United States v. Richardson, 418 U.S. 166, 188-89 (1974) (Powell, J., concurring).

124. On both the slavery and the abortion issues, for instance, the Supreme Court disrupted the efforts of legislatures to struggle toward a political solution. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (see discussion TAN 125-28, infra); Roe v. Wade, 410 U.S. 113 (1973). While the legislatures' efforts had, in both instances, been slow and agonizing, the process before the Supreme Court's

intervention was less divisive and rancorous than after it. As Justice Blackmun admitted in his opinion for the Court in Roe, for instance, "a trend toward liberalization of abortion statues has resulted in adoption, by about one-third of the States, of less stringent laws" than outright bans of abortion "however and whenever performed, when done to save or preserve the life of the mother." Id. at 139-40 (footnotes omitted).

In contrast, the Court's abstention from examining politically explosive issues concerning the Vietnam War or the acceptability of the CIA's activities encouraged political resolution of the matters. American troops withdrew from Vietnam; Senate and House intelligence oversight committees were established to keep tabs on the CIA. See Da Costa v. Laird, 405 U.S. 979 (1972) (certiorari denied in challenge to the Vietnam war; Justice Douglas dissenting); Massachusetts v. Laird, 400 U.S. 886 (1970) (original jurisdiction declined in challenge to Vietnam war; Justice Douglas again dissenting); United States v. Richardson, 418 U.S. 166 (1974) (standing denied in suit challenging congressional provision for secrecy in the budgetary accounts of the CIA; Justices Douglas, Stewart, Marshall, and Brennan, JJ., dissenting); S. Res. 400, 94th Cong., 2d Sess. (1976)(establishing Senate Select Committee on Intelligence); H.R.J. Res. 806, 95th Cong., 2d Sess. (1977)(establishing House Permanent Select Committee on Intelligence).

Similarly, the Court's holding in Laird v. Tatum, 408 U.S. 1 (1972), that plaintiffs had demonstrated no direct injury in complaining of an Army surveillance program, was soon addressed by the political branches with enactment of the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (Dec. 31, 1974) (codified at 5 U.S.C. §552a). See Hearings on Federal Data Banks, Computers and the Bill of Rights Before the Subcomm. on Consitutional Rights of the Senate Comm., 92d Cong., 1st Sess. (Feb. 1971); the practices of Army surveillance which were documented at these hearings are summarized at S. Rep. No. 1183, 93d Cong., 2d Sess. (1974). The Court has also judiciously resisted any ruling on the thorny issue of Executive Privilege, when asserted to deny a Congressional request. Such conflicts are generally resolved through negotiations between the two branches. See United States v. Nixon, 418 U.S. 683 (1974); see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C.), aff'd, 498 F.2d (D.C. Cir. 1974).

125. Ch. 22, 3 Stat. 545 (1820).

126. The Proviso was introduced on August 8, 1846, as an amendment to the House bill purchasing territory from Mexico. Although adopted in the House, it never passed the Senate. For debates see Cong. Globe, 29th Cong., 2d Sess. at 303, 352-355, 424-425, 573 (1847).

127. Ch. 59, 10 Stat. 277 (1854).

128. 60 U.S. (19 How.) 393 (1856).

129. U.S. Const. art. III, § 2 (extending the judicial power only to "Cases" and "Controversies").

130. Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. SCRAP, 412 U.S. 669 (1973).

131. United States v. SCRAP, 412 U.S. 669 (1973); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

132. Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. SCRAP, 412 U.S. 669 (1973).

133. United States v. SCRAP, 412 U.S. 669 (1973); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

134. See TAN 139, infra.

135. See note 115, supra.

136. 5 U.S. (1 Cranch) 137, 166 (1803).

137. 48 U.S. (7 How.) 1, 47 (1849).

See also Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31 (1827), wherein Justice Story stated, regarding the authority of the President to call out the state militia:

> The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeats it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of these facts.... Such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well for all other misconduct, if it should occur, is to be found in the constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of

> public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation and wanton tyranny.

See also the opinion of the Court by Chief Justice Salmon Chase in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867).

138. U.S. Const. art I, § 2 (providing for the popular election of the House of Representatives); id. art. II, § 1 (providing for the election of the President through a popularly elected Electoral College); id. art. IV, § 4 (guaranteeing "a Republican Form of Government" to each state); id. art. V (providing for the amendment of the Constitution through elected representatives); id. art. VII (providing for ratification of the Constitution by convention); id. amend. IX (leaving unenumerated rights to the people); id. amend. X (leaving undelegated power to the states, or the people); id. amends. XV, XIX, XXIV, XXVI (protecting the right to vote against discrimination on account of race, color, previous condition of servitude, sex, or failure to pay a poll or other tax, for all 18 years of age or older); id. amend. XVII (providing for the popular election of Senators).

Finally, the Constitution's preamble begins, "We the People . . . ."

139. 369 U.S. 186 (1962).

140. 395 U.S. 486 (1969).

141. Gilligan v. Morgan, 413 U.S. 1 (1973).

142. 2A C. Sands, Sutherland Statutory Construction §§ 45.05 ("The reason for [stressing the importance of the "intent of the legislature"] doubtless lies in an assumption that an obligation to construe statutes in such a way as to carry out the will, real or attributed, of the lawmaking branch of government is mandated by principles of separation of powers") (1973).

The Supreme Court has also, paradoxically, from time to time recognized the primacy to be given the views of the enacting Congress. See, e.g., Rainwater v. United States, 356 U.S. 590, 593 (1958); United States v. Price, 361 U.S. 304, 313 (1960); United States v. Wise, 370 U.S. 405, 411 (1965); Waterman Steamship Corp. v. United States, 381 U.S. 252, 259 (1965); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639 n.34 (1967); Haynes v. United States, 390 U.S. 85, 87 n.4 (1960); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968); Regional Rail Reorganization Act

Cases, 419 U.S. 102, 132 (1974); Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977); Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977); Oscar Mayer Co. v. Evans, 441 U.S. 750, 758 (1979).

143. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 50 U.S.L.W. 4457 (U.S. May 3, 1982); Cannon v. University of Chicago, 441 U.S. 677 (1977).

144. Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics 1, 6, 8 (1981).

145. The Federal Register annually has exceeded 50,000 pages since 1974.

146. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Saxbe v. Bustos, 419 U.S. 65 (1974); Runyon v. McCrary, 427 U.S. 160 (1976); Seatrain Shipbuilding Corp. v. Shell Oil Corp., 444 U.S. 572, 596 (1980); North Haven Bd. of Educ. v. Bell, 50 U.S.L.W. 4501 (U.S. May 17, 1982).

147. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 50 U.S.L.W. 4457 (U.S. May 3, 1982).

148. For instance, one of the most dramatic ways in which private suits have thwarted agency policies has been the delay caused by the suits. Judge Skelly Wright has noted that delay caused by judicial review is the most effective weapon against implementation of an administrative policy or program. Judge Wright has stated:

> While opposition to economic legislation at the administrative level is like trench warfare compared to attacking its constitutionality in court, in the long run it can be very effective, particularly because of the potential for delay. Indeed, most lawyers opposing implementation of legislation at the administrative level, if put on their Boy Scout honor, will agree that delay [through invocation of a federal court's jurisdiction] . . . is the most effective weapon against implementation . . . [I]f the industry leaders and their lawyers succeed in heavily involving federal judges in the administrative process, both during and after it eventually comes to an end with a final order, time will always be on their side and the opportunities for frustrating implementation of the legislative mandate will be virtually endless.

Id. at 110, quoting the Legal Times of Washington, Nov. 12, 1979, at 9.

The financial costs attributable to the delay associated with litigation is exemplified by lawsuits seeking to scuttle nuclear plant construction. Environmental

litigation against the Consumers Power Company in Midland, Michigan, delayed nuclear power operations for eight years and construction costs escalated from $350 million to $1.75 billion. J. Lieberman, The Litigious Society 96 (1981).

149. See, e.g., N.Y. Times, Aug. 4, 1982, at A22, col. 1 (editorial); N.Y. Times, Sept. 20, 1982, at 18, col. 1 (editorial); Commager, "The Quiet Assault on America's Constitution," L.A. Times, Oct. 17, 1982, § 4, at 3. Contra: Buchanan, "American coup d'etat by black-robed politicians," Washington Times, Oct. 27, 1982, at 10A.

150. Quoted by A. Mason, Brandeis, A Free Man's Life 102 (1946) (quoted, in turn, in J. Paschal, Mr. Justice Sutherland, A Man Against the State 35 (1951)).

Justice Brewer's confidence in the Court might have been shaken had he known the historical judgment which would be entered on his beloved Pollock Cases. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); 158 U.S. 601 (1895). These decisions had held unconstitutional an attempt by Congress to tax incomes derived from personal property or realty uniformly throughout the United States since, the Court declared, such a tax was a "direct tax" which Congress under the terms of Article I, §2 and §9, could impose only by the rule of apportionment according to population. According to Corwin, supra note 4, at 199, Justice Brewer was "in after years a fervent defender" of the Court's decision, and declared in an address:

> That argument [by which the Court reached its conclusions] is stated fully and forcibly in the opinion of the Chief Justice and nothing I could say would add to its strength. I may be permitted by passing, however, to observe that in the days to come it will in my judgment be classed among the great historic opinions of the Court and, young gentlemen, as with prophetic eye I look forward through the vista of forty years and see some of you sitting on the Supreme Bench of the Nation, I can ask no higher glory for you and your legal alma mater than that you write into the records of that Court opinions equally majestic and immortal.

D. Brewer, "The Income Tax Cases and Some Comments Thereof," Address to the Graduating Class of the University of Iowa Law School (1898) (as quoted in Corwin, supra note 4, at 199) (footnote omitted)).

151. CRS, supra note 35, at 1789-97 & 1982 Supplement (forthcoming).

152. Id. at 1794-96; James Madison Lecture on "The Life Span of a Judge-Made Rule" by Justice John Paul Stevens, New York University School of Law (Oct. 27, 1982) (p. 6 of prepared remarks) (quoting Maltz, "Some Thoughts on the Death of Stare Decisis in Constitutional Law," 1980 Wis. L. Rev. 467, 494-95)).

153. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

154. Brown v. Board of Educ., 349 U.S. 294 (1954).

155. Hepburn v. Griswold, 75 U.S. (Wall.) 603 (1870), rev'd by Knox v. Lee, 79 U.S. (12 Wall.) (1871).

156. Grovey v. Townsend, 295 U.S. 45 (1935), rev'd by Smith v. Allwright, 321 U.S. 649 (1944).

157. Minersville Dist. v. Gobitis, 310 U.S. 586 (1940), rev'd by West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

158. Jones v. Opelika, 316 U.S. 584 (1942), rev'd by Jones v. Opelika, 319 U.S. 103 (1943) (re-argument); and Murdock v. Pennsylvania, 319 U.S. 105 (1943).

159. Smith v. Allwright, 321 U.S. 649, 699 (1944) (Roberts, J., dissenting).

160. 344 U.S. 443, 540 (1953) (concurring opinion).

161. 285 U.S. 393, 407-08 (1932). See also Chicago, Milwaukee & St. Paul Ry. v. Minneapolis, 134 U.S. 418, 465 (1890) (Bradley, J., dissenting) ("There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect, courts as well as commissions and legislators").

162. See B. Fein, Equivocal Constitutional Pronouncements Plague Burger Court (Mar. 11, 1981) (unpublished manuscript). See especially footnotes 9 and 27 of the manuscript:

9/ DIVISIVENESS OF SUPREME COURT UNDER STEWARDHSIP OF CHIEF JUSTICE WARREN E. BURGER

		5-4 or 4-3 Rulings	Cases Decided by Plurality Views	Total
1.	Oct. Term 1969:	0	1	1
2.	" " 1970:	16	16	32
3.	" " 1971:	27	8	35
4.	" " 1972:	27	5	32

5.	"	"	1973:	26	3	29
6.	"	"	1974:	17	1	18
7.	"	"	1975:	8	12	20
8.	"	"	1976:	19	9	28
9.	"	"	1977:	15	9	24
10.	"	"	1978:	23	4	27
11.	"	"	1979:	22	11	33

Annual Average: 25.5

A plurality opinion is one joined by fewer than a majority of the participating Justices. The rationale of a plurality opinion is not binding on subordinate courts, and lacks the force of precedent in the Supreme Court. See e.g., Miller v. California, 413 U.S. 15 (1973) (rejecting test of obscenity fashioned by a plurality in Memoirs v. Massachusetts, 383 U.S. 413 (1966)); Blackburn v. Thomas, 450 U.S. 953 (1981) (Powell, J. dissenting from denial of a writ of certiorari and noting lack of precential weight to be accorded the plurality opinion in Brown v. Louisiana, [447 U.S. 323 (1980)]).

27/ DIVISIVENESS OF SUPREME COURT UNDER STEWARDSHIP OF CHIEF JUSTICE EARL C. WARREN

		5-4 or 4-3 Rulings	Cases Decided by Plurality Views	Total
1.	Oct. Term 1953:	8	3	11
2.	" " 1954:	0	1	1
3.	" " 1955:	12	1	13
4.	" " 1956:	11	3	14
5.	" " 1957:	23	1	24
6.	" " 1958:	19	2	21
7.	" " 1959:	24	2	26
8.	" " 1960:	24	7	31
9.	" " 1961:	10	3	13
10.	" " 1962:	13	1	14
11.	" " 1963:	14	2	16
12.	" " 1964:	7	1	8
13.	" " 1965:	10	3	13
14.	" " 1966:	16	3	19
15.	" " 1967:	0	1	1
16.	" " 1968:	7	2	9

Annual Average: 14.6

During Chief Justice John Marshall's stewardship of the Court from 1801-1835, the aggregate number of dissents was 121, or approximately 4 dissents each term. See R. Seddig, John Marshall and the Origins of

Supreme Court Leadership, 36 U. Pitt. L. Rev. 785, 800 (1975).

One reason for the increasing lack of consensus, and the increasing acrimony attendant thereto, is the Court's insistence on playing a policymaking role. "Truly, [the Court's] political speeches and ideological swipes are inevitable in tugs of war over policy deliberation and choice; they are the stuff of the rough and tumble fray of political life." McDowell, Justice O'Connor and the Supreme Court brawl, Washington Times, Nov. 18, 1982, at 11.

163. See Rules of United States Court of Appeals for the Second Circuit, Rule 34(g) (determination by court not to hear oral argument), Civil Appeals Management Plan, Rules 3, 5, 7, Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals; Rules of United States Court of Appeals for the Fourth Circuit, Rules 7(b) (disposition of appeal without oral argument), 18 (unpublished opinions); Rules of the United States Court of Appeals for the Sixth Circuit, Rule 24 (unpublished decisions); Rules of the United States Court of Appeals for the Seventh Circuit, Rule 35 (unpublished decisions); Rules of the United States Court of Appeals for the Eighth Circuit, Rule 10 (screening procedures for oral argument and disposition without oral argument); Rules of United States Court of Appeals for the Eleventh Circuit, Rules 23, 24 (establishing a two-calendar system with a "non-argument calendar" and an "oral argument calendar").

164. See, e.g., N.Y. Times, Nov. 19, 1982, at B1 (article entitled "[Chief Justice] Burger Says Growing Caseload May Break Down the U.S. System of Justice") ("In his speech last night Mr. Burger became the seventh member of the Supreme Court in the last four months to urge a reduction in the [Supreme Court's] caseload"). The Chief Justice declared:

> The needs of the present and future are suggested when we look at the record. Even the cold figures of the Federal Courts are very instructive. In the past forty years case filings increased the annual caseload for each District Judge from 159 cases to 350 cases even with a large increase in judgeships. .The real meaning of these figures emerges, when we see that District Court civil cases increased more than seven times as fast as the population and Courts of Appeals filings increased ten times faster than the population. We live up to the statement that we asre the most litigious people on the globe.
>
> There has been another very significant change in the work of the courts and that is a change in the content of cases, presenting issues far more novel and complex than in the past. Part of the reason is that in the

past 15 years Congress has enacted approximately 100 statutes creating new causes of action and enlarging the federal jurisdiction. Many of these present wholly novel legal issues where precedents are of little help to judges.

In 1960, for example, there were approximately 45 federal cases which took more than one month to try. That has now increased to 164, or four times as much. The state courts are experiencing a similar increase in what we identify as the protracted case . . .

. . . .

Apart from bare numbers, qualified court observers, including practitioners and scholars, have commented on the extraordinary change in the content of the Court's calendar. They point to the novelty of the questions the Supreme Court must decide for which, in many instance, there are virtually no precedents. Some observers have said that even if we had only 100 fully argued cases a year, the novelty and complexity of a large proportion of those 100 cases would strain the Court's capacity to the limit.

. . . .

. . . I have, however, emphatically stated, and I repeat now with even more emphasis, that if some changes are not made, the work of the Court will fall more and more behind and the qualify will suffer.

Chief Justice Warren E. Burger, Remarks at the Arthur T. Vanderbilt Dinner (in New York City Nov. 18, 1982), at 4, 8, 10.

See also, Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, at A-221 through A-244 (1975); "Justice Lewis Powell: A view from the top," Cal. Law., Nov. 1982, at 63, 64 (interview with Justice Powell); Remarks of Justice Lewis F. Powell, Jr., ABA Division of Judicial Administration, San Francisco (Aug. 9, 1982); Washington Post, Oct. 29, 1982, at A3 (article entitled "[Justice] Stevens Presses To Cut Caseload"); id., Nov. 26, 1982, at A16, col. 1 (editorial).

165. Quoted in Hruska, "The Commission on Revision of the Federal Court Appellate System: A Legislative History," 1974 Ariz. St. L.J. 579, 583 n.14.

166. Remarks of Justice William H. Rehnquist, Mac Swinford Lecture at the University of Kentucky (Sept. 23, 1982). See also "Justice Lewis Powell: A view from the top," Cal.

Law., Nov. 1982, at 63, 64 (interview wherein Justice Powell states: "There is no question that the overload problem in the federal court system is very serious and that it affects the quality of justice at every level"; and "I think you could argue fairly that nine justices working as hard as the present members of the court do cannot produce quite the same quality of opinions and other writings as they could 20 years ago . . ."); Washington Post, Nov. 26, 1982, at A16, col. 1 (editorial) ("Seven members of the Supreme Court are intent on doing something about their workload, and a few of them gently confess what some observers have sensed for years: the growing burdens have hurt the quality of the judicial process, as measured by such things as the careful selection of cases to hear on appeal and the clarity, if not wisdom, of opinions").

167. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (benzine exposure standards); United Steelworkers v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980) (OSHA lead exposure standards); American Fed. of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979), aff'd in part sub nom. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (OSHA cotton dust exposure standards); Natural Resources Defense Council v. Nuclear Regulatory Commission, 685 F.2d 459 (D.C. Cir. 1982) (environmental impact of uranium fuel cycle associated with the operation of nuclear power plants).

168. See, e.g., Alabama Power Co. v. Costle, 606 F.2d 1068 (D.C. Cir. 1979) (Clean Air Act standards); BASF Wyandotte v. Costle, 598 F.2d 637 (1st Cir. 1979) (Federal Water Polution Control Act).

169. Wald, "Making 'Informed Decisions' on the District of Columbia Circuit," 50 Geo. Wash. L. Rev. 135, 136 (1982).

170. Kaufman, "Judicial Review of Agency Action: A Judge's Unburdening," 45 N.Y.U.L. Rev. 201, 201-02 (1970) (hereinafter "Kaufman").

171. Clean Air Act, 42 U.S.C. §§ 7401 et seq.; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq.; Endangered Species Act, 16 U.S.C. §§ 1531 et seq.; Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 et seq.; Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq.; Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.; National Environmental Policy Act, 42 U.S.C. 4321 et seq.

As Judge Thomas Gee of the Fifth Circuit has observed:

> In all fairness, one must observe that the Congress itself has contributed mightily to the situation and

> tendencies [i.e., judicial policymaking] that I have described. In addition to enacting such measures as those involving lending practices and odometers on used cars and mandating the full panoply of federal trial and review for their disposition, a torrent of broad and vague social legislation has poured forth in recent times that invites and sometimes all but requires policy interventions by the courts. Much of title VII[17] and the OSHA[18] legislation, to cite only two examples, is so generally couched as to resemble nothing so much as a punting of the policy football to the courts for handling there.
>
> 17. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978).
> 18. 29 U.S.C. §§ 651-678 (1976, Supp. II 1978 & Supp. III 1979).

"Starving the Tiger: Some Problems About the Federal Bench," 34 Sw. L.J. 1171, 1177 (1981).

And, as Professor Peter Schuck wrote of the Age Discrimination Act of 1975, Pub. L. No. 94-302, 89 Stat. 728-32 (Nov. 28, 1975) (codified at 42 U.S.C. §§ 6101-07, as amended):

> Congress [in passing the act] performed few of the conventional policy-making functions for which it is thought to be admirably designed: it failed to specify the problem; it gathered little information; it failed to articulate and weigh competing values or reduce them to operational terms; it considered no alternatives; and it declined to make hard choices. Having neglected to define the problem, Congress designed a legislative solution that, by reason of its singular indeterminacy, seemed consistent with any number of possible problem definitions.
>
> . . . .
>
> Whether [an administrative] agency is determining the extent to which it should target CETA [Comprehensive Employment and Training Act] job-training funds on teenagers or senior citizens, which mix of services Community Mental Health Centers should provide, what age groups an adoption agency should concentrate on placing, or what the office hours of a local social service agency should be, the agency will be confronting problems [not readily solved under the act].
>
> ....
>
> Without decision rules to look to, without a methodology for identifying appropriate criteria or assigning them appropriate weights, courts will be cast adrift on a sea of discretion... When this comes to pass, and the judiciary has been fully denounced as "imperial," it will be well to recall that in this

case, at last, its crown, like that offered to Shakespeare's Caesar, was neither requested nor usurped but was pressed upon it by politicians at the Capitol.

"The Graying of Civil Rights Law: The Age Discrimination Act of 1975," 89 Yale L.J. 27, 93, 82, 91-92, 93 (1979) (as quoted in J. Lieberman, The Litigious Society 181 (1981)).

See also Alabama Power Co. v. Gorsuch, 672 F.2d 1, 20 (D.C. Cir. 1982) (Wilkey, J., dissenting). In the context of the attorneys' fees provision of the Clean Air Act, supra this note, Judge Wilkey criticized Congress for giving the court only the vague instruction that it may award fees "whenever it determines that such award is appropriate," 42 U.S.C. §7607(f). Judge Wilkey wrote:

> The unfortunate phenomenon of the judiciary acting as legislature is not entirely the fault of judges. Congress must also bear some of the blame because of deliberate or inadvertent abdication of decisionmaking to the courts. In drafting a statute charging the courts to award costs and fees where "appropriate," it is difficult -- and at this point unimportant -- to tell whether this vague instruction was the result of the efforts of draftsmen who had an enormously complex and lengthy act to write, or the result of a deliberate compromise in the bill's acrimonious passage.
>
> "Appropriate," without more, is not an appropriate word, for its meaning varies with the politics of the reader. It should be clear that the award of fees and costs might in a given instance seem appropriate to some but inappropriate to others.[64] Webster's Third New International Dictionary defines "appropriate" as "specially suitable: fit, proper." This definition demonstrates the term's subjectivity and vagueness -- and thus the difficulty of any principled judicial interpretation.

64. Congressmen of such divergent views as David Stockman and Toby Moffett were on the 1977 bill's House committee.

172. 79 U.S. (12 Wall.) 457, 670 (1871) (Field, J., dissenting).

173. J. Bass, Unlikely Heroes 116 (1981) (interview with Judge Skelly Wright).

174. A. Bickel, The Morality of Consent 120-21 (1975) (emphasis in the original).

175. Remarks of Judge Patricia M. Wald, Virginia Woman's Bar Ass'n (Oct. 9, 1982) (pp. 6-7 of prepared remarks).

176. Kaufman, supra note 170, at 208-09; W. Douglas, The Court Years (1980) (e.g., at p. 8, where Justice Douglas confessed that ninety percent of the controlling factors in his decisionmaking were emotional rather than cerebral); R. Neely, How Courts Govern America (1981). Judge James L. Oakes of the Second Circuit is another example of this sort of judge. He has recently stated:

> It [judicial review] is a substitute for a failure of action on the part of the Executive occasionally either to appoint public-interest minded regulators or to promote programs . . ., in which the public is really represented . . ..
>
> And it also is a substitute, if you will, for a failure at times on the part of the agencies themselves to stand for the basic propositions which we all want to stand for, both in terms of the public interest and what is right in law.

Quoted in "Panel IV: Judicial Review of Agency Action," 26 Ad. L. Rev. 545, 576 (1974) (remarks in panel discussion).

177. Quoted in Corwin, supra note 4, at 119.

178. According to Justice Powell:

> . . .[W]hen the crunch comes, judges have been the ones who have preserved the basic liberties of our people. It was the Supreme Court that desegregated the schools of our country, not the Congress. The Supreme Court decided the one-man, one-vote issue when the legislative branch was unwilling to tackle it.

"Justice Lewis Powell: A view from the top," Cal. Law., Nov. 1982, at 63, 64 (interview). Justice Powell also stated that "the ultimate strength of a judicial system rests in the courage, conscience and impartiality of individual judges," and that "judges, possessing these qualities, have formed the 'thin black line' that has stood resolutely between human liberty and the awesome power of government." Remarks of Justice Lewis F. Powell, Jr., ABA Division of Judicial Administration, San Francisco (Aug. 9, 1982) (pp. 16-17 of prepared remarks). See also R. Neely, How Courts Govern America (1981).

History does not support the views of Powell, but rather those of Justice Holmes, who observed:

> Judges are apt to be naif, simpleminded men, and they need something of of Mephistopheles. We too need

education in the obvious -- to learn to transcend our own convictions and to leave room for much we hold dear to be done away with short of revolution by the orderly change of law.

O. W. Holmes, "Laws and the Court," in Occasional Speeches 172 (Howe ed. 1962).

179. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

180. Grovey v. Townsend, 295 U.S. 45 (1935).

181. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

182. Civil Rights Cases, 109 U.S. 3 (1883).

183. United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Harris, 106 U.S. 629 (1882).

184. Ableman v. Booth, 62 U.S. (21 How.) 506 (1842).

185. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

186. Minor v. Happersett, 88 U.S. (21 Wall.) (162 (1875).

187. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); In re Lockwood, 154 U.S. 116 (1894).

188. Mackenzie v. Hare, 239 U.S. 299 (1915).

189. Plessy v. Ferguson, 163 U.S. 537 (1896).

190. Gong Lum v. Rice, 275 U.S. 78 (1927).

191. Hammer v. Dagenhart 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co. 259 U.S. 20 (1922).

192. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); 158 U.S. 601 (1895).

193. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

194. Lochner v. New York, 198 U.S. 45 (1925); Morehead v. New York, 298 U.S. 598 (1936); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

195. Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915).

196. Truax v. Corrigan, 257 U.S. 312 (1921).

197. Gulf, Colo. & San Francisco Ry. v. Ellis, 165 U.S. 150 (1897); Atchison, Topeka & Santa Fe Ry. v. Vosburg, 238 U.S. 56 (1915).

198. Loewe v. Lawlor, 208 U.S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); United States v. Brims, 272 U.S. 549 (1926); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927). See also Jackson, supra note 6, at 63-64.

199. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

200. United States v. Schwimmer, 279 U.S. 644 (1929).

201. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869).

202. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

203. Tyson & Bro. v. Banton, 273 U.S. 418 (1927).

204. Williams v. Standard Oil Co., 278 U.S. 235 (1929).

205. Buck v. Bell, 274 U.S. 200 (1927).

206. Terrace v. Thompson, 263 U.S. 197 (1923); Cockrill v. California, 268 U.S. 258 (1925).

207. Chinese Exclusion Cases, 130 U.S. 581 (1889).

208. United States ex. rel. Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921).

209. This is not to say that all of these cases were wrongly decided. Some holdings were justified because the actions upheld, however immoral, were nonetheless constitutional. These decisions, however, discredit those who defend arrogation of power by the Supreme Court on the theory that its rulings invariably advance the cause of morality.

210. 2 Writings 366 (Congressional ed.) (as quoted in Corwin, supra note 4, at 23).

211. Missouri, Kan. & Tex. R.R. v. May, 194 U.S. 267, 270 (1904).

212. Corwin, supra note 4, at 126-27.

213. Korematsu v. United States, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting):

> But once a judicial opinion rationalizes such an order [like the one in Korematsu, which interned all persons of Japanese ancestry in a described West Coast military area] to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the

> Constitution sanctions such an order, the Court has for all time validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need.

(Emphasis added.)

On the primacy of means over ends in a legal order, see generally E. Burke, Reflections on the Revolution in France (Gateway Ed. 1955); A. Bickel, The Morality of Consent (1975); Bork, The Legacy of Alexander M. Bickel, Yale L. Rep., Fall 1979, at 6.

214. R. Bolt, A Man for All Seasons Act I in Three Plays 147 (Heinemann ed. 1967). This passage was quoted by Chief Justice Burger in his opinion for the Court in TVA v. Hill, 437 U.S. 153, 195 (1973).